TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 55

OLD DOMINION LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED MAY 4, 1926.

(30,914)

(30,314)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. 376

OLD DOMINION LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1924

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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, Virginia, on the first Tuesday in February, being the 5th day of the same month, in the year of our Lord one thousand nine hundred and twenty-four.

Present: Hon. Charles A. Woods, Circuit Judge; Hon. Edmund Waddill, Jr., Circuit Judge; Hon. John C. Rose, Circuit Judge.

Among other were the following proceedings, to-wit:

Old Dominion Land Company, a Corporation, Plaintiff in Error,

versus

United States of America, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Be it remembered that heretofore, to-wit, on August 18, 1923, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room in the Court House and Post Office Building, in the City of Norfolk, on the first Monday of November, being the Sixth day of the same month, in the year of our Lord One thousand nine hundred and twenty-two.

Present: The Honorable D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In the Matter of the

Condemnation of certain lands in the County of Warwick, in the State of Virginia, and within the City of Newport News, in the County of Warwick, in the State of Virginia, needed by the United States of America for a site for the Quartermaster Warehouses for use of Naval and Military Forces and/or Inland or Port Storage and Shipping Facilities, and for other purposes and for Public Buildings desired by the United States of America. — At Law.

PETITION OF THE UNITED STATES OF AMERICA

(2) Filed July 29th, 1922.

To the Honorable D. Lawrence Groner, Judge of said Court:

The United States of America, respectfully represents:

FIRST: That on August 1st, 1888, (25 Stat. at L. 357) the Congress of the United States passed an act entitled "An Act to Authorize Condemnation of Lands for sites for Public buildings and for other purposes," and, that on the 1st day of July, 1922 (H. R. 12090, — Stat. at L. —) the Congress of the United States passed an act entitled "An Act Making Appropriations to Supply Deficiencies in Appropriations for the Fiscal year ending June 30, 1922, and Prior Fiscal Years, Supplemental Appropriations for the Fiscal Year ending June 30th, 1923, and for other purposes", which, among other things, made appropriation for the acquisition of the land herein, desired by the United States, and, also, that on March 8th, 1922, the Congress of the United States passed an act entitled "An Act to Amend the Army Appropriation Act approved July 11th, 1919," authorizing the acquisition by the United States of America of the land herein desired and described, all of which will more fully appear from the aforesaid Acts of Congress, to which reference is hereby expressly made.

SECOND: That the hereinafter described land, heretofore occupied by petitioners under a lease from the owners thereof, is needed by petitioners for a site for quartermaster warehouses for the use of naval and mili-
(3) tary forces, and/or inland or port storage and shipping facilities, and for other purposes, and for public buildings desired by the United States of America.

THIRD: That the names and addresses of the owners or persons having a right, title, estate, claim or interest in the freehold sought to be taken, and other persons likely to be damaged by the use of the aforesaid land for the purposes herein set out, in so far as petitioners have been able to ascertain or deem it advisable or necessary to state, are set forth in Exhibit "A" hereto attached and asked to be read as a part of this petition.

FOURTH: That the interest proposed to be taken by the petitioners is a fee simple interest in and to the property described in Exhibit "C", attached hereto and made a part of this petition.

FIFTH: That petitioners have endeavored to acquire the interest herein described to be condemned by purchase, but have been unable to agree with the owners of said property upon the price and terms of the same, and petitioners, through their officers, agents and duly authorized representatives, have made due effort to determine and discover who are the proper persons entitled to receive just compensation for said land, and stand willing and ready to pay just compensation to such persons and classes of persons as may in these proceedings be determined and held to have a right, title, estate, claim or interest in said land, or are likely to be damaged by reason of the taking of the said land, or the doing of the work, or the making or maintaining the proposed improvements and using the land for the purposes herein set out, or, in any other way damaged by the condemnation and acquisition of said land. For this and various other reasons the title to said land cannot be made satisfactory to the Attorney General of the United States, and therefore these condemnation proceed-
(4) ings are necessary and proper.

SIXTH: That the said property consists of real estate in the County of Warwick, in the State of Virginia, and in the City of Newport News, in the County of Warwick, in the State of Virginia, and in the Eastern Judicial District of the State of Virginia, within the jurisdiction of the District Court of the United States for the Eastern District of Virginia and within the Norfolk Division of said District, the metes and bounds and description of which appear upon the blueprint copied of certain plate of survey thereof marked Exhibit "B" hereto attached and made a part hereof, together with memorandum showing the names and residences of the owners or persons having a right, title, estate, claim or interest in the said land, in so far as petitioners are informed or have been able by reasonable diligence to ascertain, marked Exhibit "A", and a typewritten memorandum describing the land and each of the tracts of said land, showing the quantity thereof, marked "Exhibit "C", this day filed in the office of the Clerk of this Court at Norfolk, Virginia, along with and attached hereto and made a part of this petition.

SEVENTH: This petition is filed, and these proceedings are instituted, by direction of the Attorney General of the United States of America, acting in that behalf, and in accordance with the request of the Secretary of War of the United States of America, and under and by authority of the Acts of Congress aforesaid.

Wherefore, your petitioners pray that it may be ascertained by proper proceedings in this cause as provided by law, what will be just compensation, who are the persons or classes of persons owning or having a right, title, estate, claim or interest to compensation, for the land proposed to be condemned for the use of petitioners, as aforesaid, and what will be just compensation for the said land and the amount due to each person, persons, classes of persons, or claimants, and award damages, if (5) any, resulting to adjacent or other property owners, or to the property of any other person or persons, beyond the pecuniary benefits that have accrued or will accrue to such properties, respectively, for the use aforesaid by the United States of America to the property sought to be condemned; that the property be condemned and the titled thereto vested in the United States of America, and that petitioners have all other, further and necessary and general relief. And petitioners will ever pray, etc.

UNITED STATES OF AMERICA.
By PAUL W. KEAR,
United States Attorney for the
Eastern District of Virginia.

Subscribed and sworn to before me this 29th day of July, 1922.

P. R. FLANAGAN,
Deputy Clerk.

I hereby certify that the petition of the United States of America for the condemnation of the lands mentioned herein was filed in the Clerk's Office of said Court on July 29th, 1922.

P. R. FLANAGAN,
Deputy Clerk.

July 29, 1922.

ORDER

(6) Entered September 15, 1922.

On motion of the Old Dominion Land Company and Newport News Light & Water Company by J. Winston Read, their attorney, leave is given them to file their separate motion to dismiss, and answers to the petition of the United States, and said motions and answers are accordingly filed.

D. LAWRENCE GRONER,
Sept. 15, 1922. U. S. District Judge.

MOTION TO DISMISS

(7) Filed September 15, 1922.

The Old Dominion Land Company, a Corporation, by its attorney, moves to dismiss the proceedings in this case, for the following reasons:

1. The petition fails to show upon its face that the Secretary of War, or any other officer of the United States Government, had been authorized to acquire the lands and property mentioned in the petition for public use.

2. The petition fails to show that in the opinion of the Secretary of War, or any other officer of the United States Government, it is necessary and advantageous to the United States that the lands and property mentioned in the petition should be acquired by condemnation for the United States under judicial process.

R. G. BICKFORD,
J. WINSTON READ,
Attorneys.

ORDER GRANTING LEAVE TO AMEND PETITION, ETC.

(8) Entered & Filed February 14, 1923.

On motion of the Old Dominion Land Company and the Newport News Light and Water Company, leave is given them to file their amended motions to dismiss the proceedings in this case.

Upon consideration whereof, the Court doth sustain the said motion to the extent that the petition fails to show that in the opinion of the Secretary of War, or any other officer of the United States Government, it is necessary or advantageous to the United States that the lands mentioned in the petition should be acquired by condemnation by the United States, and doth overrule said motion in all other particulars, to which action of the Court in overruling said motion, said defendants except.

Upon motion of the petitioners leave is granted them to amend their petition heretofore filed in this cause, by striking out the words, in the second paragraph, "or naval and" and the words "and for other purposes", and on like motion, leave is granted the petitioners to amend the seventh paragraph of their petition to read as follows: "That the Secretary of War has officially determined that it is necessary and advantageous for the petitioners to acquire the lands hereinbefore mentioned and referred to by condemnation proceedings, under judicial process, and has certified that fact to the Attorney General of the United States, and that these proceedings are instituted by direction of the Attorney General of the United States, acting in that behalf and in accord-
(9) ance with the request of the Secretary of War, and under the authority of the Acts of Congress aforesaid. The petitioners file herewith as a part of this petition, photostatic copy of a letter of the Secretary of War to the Attorney General of the United States, dated July 21, 1922, and marked "Exhibit 1-a."

And thereupon the respondents moved to dismiss the amended petition upon the ground that as amended, it

fails to meet the objections heretofore filed in writing, to the original petition.

Upon consideration of this motion, the court overrules the same, and counsel for the respondents except to the ruling of the Court.

D. LAWRENCE GRONER,
Norfolk, Va. U. S. District Judge.

EXHIBIT 1-A WITH AMENDED PETITION

(10) Filed February 14, 1923.

WAR DEPARTMENT

WASHINGTON

July 21, 1922.

The Honorable,
The Attorney General,

My dear Mr. Attorney General:

During the war the Government selected certain land at Newport News, Virginia, as a site for Quartermaster Warehouses.

Improvements aggregating $1,995,000.00 were placed on the site. Since that time some of the land forming a part of the warehouse site has been relinquished and the improvements thereon salvage. There still remain on the land, now in possession by the Government, improvements representing a cost of $1,522,000.00.

To protect the Government's interests it is necessary and highly advantageous to acquire title to the lands upon which these improvements are situated.

In 1919 an effort was made to acquire title to these lands by direct purchase but as the price demanded by the owners was excessive and unreasonable condemnation proceedings were recommended and approved by the Secretary of War.

Further action toward the procurement of title under authority of the Secretary of War from the funds then

available was stopped by the provisions of the Act of July 11, 1919. An appropriation has since been made by the Congress which is now available for the acquisition of these lands. The appropriation is contained in H. R. 12090, entitled "An Act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1922, and prior fiscal years, supplemental appropriations for the fiscal year ending June (11) 30, 1923, and for other purposes."

Authority for the acquisition of these lands is contained in the Act just cited and the Act approved March 8, 1922, entitled "An Act to amend the Army Appropriation Act, approved July 11, 1919."

These lands have been under lease ever since their selection as a site for the Quartermaster Warehouses. Effort was made to renew the leases but the lessors refused to renew, so that all the leases expired on June 30, 1922. These leases provide that all Government improvements must be removed within thirty (30) days after the expiration thereof.

The following data is transmitted herewith for your information and use:

(a) Detailed report of the status of acquisition of the lands sought to be acquired, made by Mr. W. F. Turton of the Real Estate Service, Office of the Quartermaster General, marked "Exhibit A."

(b) Photostat of each of the leases and the renewals thereof, together with notices to renew, and a photostat of map showing the land leased, marked "Exhibit B."

(c) Photostat of the approval of the Secretary of War, dated July 7, 1919, authorizing the original institution of condemnation proceedings to acquire the land by virtue of the Act of July 2 1917, as amended April 8, 1918, together with photostat copies of certain correspondence relative to the acquisition, marked "Exhibit C."

The property sought to be acquired is that of the Old Dominion Land Company and the Washington McLean

Estate. An accurate survey of the particular land to be acquired is now being made and as soon as completed a legal description thereof will be forwarded to you.

In view of the fact that this is a matter requiring immediate action, you are requested to institute condemnation proceedings before July 30, 1922, to acquire the fee simple title to the land in question, the approximate area of which is outlined in red on the photostat map transmitted herewith, and to take such other steps as are necessary to protect the Government's interests.

Sincerely yours,

(Signed) JOHN W. WEEKS,
Secretary of War.

(12)
3 Encls.
(Exhibit A—Report).
Exhibit B—Photostats of leases, renewals and map).
(Exhibit C—Photostats of correspondence).

In reply refer to
G-4/7237

(13) June 29, 1922.

MEMORANDUM FOR THE ADJUTANT GENERAL OF THE ARMY:

SUBJECT: Military Guard for the protection of Warehouse Groups 2 and 3, Newport News, Va.

1. The Secretary of War directs that a telegram be sent to the Commanding General, III Corps Area, as follows:

"The Secretary of War directs that you instruct the Commanding Officer, Fort Monroe, by wire, to cooperate with the Commanding Officer, Norfolk Depot, by furnishing suitable guard for purpose of protecting the buildings and other improvements known as warehouse groups 2 and 3, constructed on land leased from the Old Dominion Company at Newport News. Upon expiration

of lease, the right of the owner to enter upon the land will not be interfered with by the guard whose duty will be confined to the protection of the buildings and other improvements thereon the property of the United States."

II. The Secretary of War further directs that the attached memorandum from the Quartermaster General, with inclosures thereto, together with a copy of the above telegram, be referred to the Commanding General, III Corps Area for his information and guidance.

W. D. CONNOR,
Brigadier General.
Assistant Chief of Staff.

By: J. B. LINDSRY, (?)
Colonel, General Staff.

Incl:
Memo fr. QMG 6/29/22 w/1 incl.

(14)

OLD DOMINION LAND COMPANY

W. B. Livezey, Pres. & Tres. — 61 Broadway
I. C. Kiggins, Vice-Pres. — New York
E. A. Adams, Sec. & Asst. Tres. — HotelWarwick Building
Newport News, Va.

New York, June 30th, 1922.

Brigadier General J. B. Carson,
Chief Construction Service, U. S. A.,
Office of Quarter Master General,
Washington, D. C.

My dear General Carson:

This is to confirm, in writing, my telegram of this A. M. which reads as follows:

"Case, Special Counsel reports you do not fully understand paragraph four of Old Dominion Land Company letter June twentyfourth to Commanding Officer Nor-

folk Intermediate Depot Norfolk Virginia STOP The Land Company desires to make its position perfectly clear to you STOP Said Letter refers to the fact that the present leases contain no right of renewal in the United States STOP These leases expire as therein provided STOP Thereafter the United States has thirty days in which there shall be removed from the premises buildings and other improvements fixed to or erected or placed in or upon the premises by the U. S. STOP After the expiration of this thirty day period the right of the U. S. to go in, on or over the premises or to remove any buildings, improvements, structures or fixtures in or upon the premises terminates and thereupon all existing rights of the U. S. will have been extinguished STOP I am wiring you direct to save time but will request Case, Special Counsel to confirm this wire by letter to be delivered you today STOP I will also confirm it by letter from here."

Very truly yours,

W. B. LIVEZEY,
President.

Law Offices of

(15) RALPH H. CASE

District National Bank Building

WASHINGTON, D. C.

June 30th, 1922.

Brigadier General J. B. Carson,
Chief of Construction Service,
Office of Quartermaster General,
Washington, D. C.

Dear Sir:

I am instructed by the President of the Old Dominion Land Company to confirm by letter to you, a telegram which the President of the Land Company has sent to you this date. Mr. Livezey read the telegram to me over the telephone at 11:30 A. M. this date as follows, to-wit:

"Brigadier General J. B. Carson,
Chief of Construction Service,
Office of Quartermaster General,
Washington, D. C.

Reported you do not understand paragraph four of Old Dominion Land Companys letter of June 24 to the Commanding Officer Norfolk Intermediate Supply Depot Norfolk Virginia stop The Land Company desires to make its position perfectly clear to you stop Said letter refers to the fact that the said leases contain no right of renewal in the United States stop These leases expire as therein provided stop Thereafter the United States has thirty days in which there shall be removed from the premises buildings and other improvements affixed to or placed in or upon the premises by the United States stop At the expiration of this thirty day period the right of the United States to go in on or over the premises or to remove any buildings improvements structures or fixtures in or upon the premises terminates and thereupon all existing rights of the United States will have been extinguished stop I am wiring you direct to save time but will request Case Special Counsel to confirm this wire by letter to you to be delivered to you stop I will also confirm it by letter from here

(Signed) W. B. LIVEZEY, President,
Old Dominion Land Company."

In conformity with Mr. Livezey's request, I am delivering this letter to you in person.

Yours very truly,

RALPH H. CASE,
RHC: AMB. Special Counsel, Old Dominion Land Co.

(16) WESTERN UNION TELEGRAM

RECEIVED AT

(New Interior Building
Franklin 7100 Branch 47)

C64W KQ 187 I EX

CO NEW YORK NY 1221P JUNE 30 1922

BRIG GENERAL J. B. CARSON
CHIEF CONSTRUCTION SERVICE USA OFFICE
Q M GNL WASHINGTON DC

CASE SPECIAL COUNSEL REPORTS YOU DO NOT FULLY UNDERSTAND PARAGRAPH FOUR OF OLD DOMINION LAND COMPANY LETTER JUNE TWENTY FOURTH TO COMMANDING OFFICER NORFOLK INTERMEDIATE DEPOT NORFOLK VIRGINIA STOP THE LAND COMPANY DESIRES TO MAKE ITS POSITION PERFECTLY CLEAR TO YOU STOP SAID LETTER REFERS TO THE FACT THAT THE PRESENT LEASES CONTAIN NO RIGHT OF RENEWAL IN THE UNITED STATES STOP THESE LEASES EXPIRE AS THEREIN PROVIDED STOP THEREAFTER THE UNITED STATES HAS THIRTY DAYS IN WHICH THERE SHALL BE REMOVED FROM THE PREMISES BUILDINGS AND OTHER IMPROVEMENTS FIXED TO OR ERECTED OR PLACED IN OR UPON THE PREMISES BY THE U. S. STOP AFTER THE EXPIRATION OF THIS THIRTY DAY PERIOD THE RIGHT OF THE US TO GO IN ON OR OVER THE PREMISES OR TO REMOVE ANY BUILDINGS IMPROVEMENTS STRUCTURES OR FIXTURES IN OR UPON THE PREMISES TERMINATES AND THEREUPON ALL EXISTING RIGHTS OF THE US WILL HAVE BEEN EXTINGUISHED STOP I AM WIRING YOU DIRECT TO HAVE TIME BUT WILL REQUEST CASE SPECIAL COUNSEL TO CONFIRM THIS WIRE BY LETTER TO BE DELIVERED YOU TODAY STOP I WILL ALSO CONFIRM IT BY LETTER FROM HERE

W. B. LIVEZEY,
President.
128P

OLD DOMINION LAND COMPANY

(17)

Hotel Warwick Building

Newport News, Va. July 6th, 1922.

W. B. LIVEZEY,
President.

LIEUT. Colonel J. R. Pourie, Q. M. C.,
Commanding, Norfolk Quartermaster
Intermediate Depot,
Norfolk, Virginia.

Sir:

1. The Old Dominion Land Company has the honor to acknowledge receipt of your letter dated June 30, 1922, subject:
Renewal of Lease, Parcel No. 1, Blocks No. 531, 549, 567, 585, 603, 621 and 639, Plat Book 1 page 3, Parcel No. 2 approximately 5-2/3 acres, situate in Warwick Co., Va., rental $154.75 per month, fiscal year 1923, the said letter having been delivered at this office by an officer of the U. S. A. the afternoon of June 30, 1922.

2. The Old Dominion Land Company respectfully denies any right of lease renewal in the United States.

Very respectfully,

OLD DOMINION LAND COMPANY,
By W. B. LIVEZEY.
President.

WBL/W.

OLD DOMINION LAND COMPANY

(18)

Hotel Warwick Building.

Newport News, Va., July 6th, 1922.

W. B. LIVEZEY,
President.

Lieut. Colonel J. R. Pourie, Q. M. C., Commanding
Norfolk Quartermaster Intermediate Depot,
Norfolk, Va.

Sir:

1. The Old Dominion Land Company has the honor

to acknowledge receipt of your letter dated June 30, 1922, subject: Renewal of Lease, Lots 25 to 32 and 41 to 48, all inclusive, in Block 513, Newport News, Va., rental $27.60 per month, fiscal year 1923, the said letter having been delivered at this office by an officer of the U. S. A. the afternoon of June 30, 1922.

2. The Old Dominion Land Company respectfully denies any right of lease renewal in the United States.

Very respectfully,

OLD DOMINION LAND COMPANY,
By W. B. LIVEZEY,
President.

WBL/W

OLD DOMINION LAND COMPANY

(19) Hotel Warwick Building.

Newport News, Va., July 6th, 1922.

W. B. LIVEZEY,
President.

LIEUT. Colonel J. R. Pourie, Q. M. C., Commanding
Norfolk Quartermaster Intermediate Depot,
Norfolk, Va.

Sir:

1. The Old Dominion Land Company has the honor to acknowledge receipt of your letter dated June 30th, 1922, Subject: Renewal of Lease, Land on Virginia Avenue, between 57th and 58th Streets, Newport News, Va., rental $18.67 per month, fiscal year 1923, the said letter having been delivered at this office by an officer of the U. S. A. the afternoon of June 30th, 1922.

2. The Old Dominion Land Company respectfully denies any right of lease renewal in the United States.

OLD DOMINION LAND COMPANY.
By W. B. LIVEZEY,
President.

WBL/W.

OLD DOMINION LAND COMPANY.

(20) Hotel Warwick Building.

Newport News, Va., July 6th, 1922.

W. B. LIVEZEY,
President.

Lieut. Colonel J. R. Pourie, Q. M. C. Commanding
Norfolk Quartermaster Intermediate Depot,
Norfolk, Va.

SIR:

1. The Old Dominion Land Company has the honor to acknowledge receipt of your letter dated June 30th, 1922, subject: Renewal of Supplemental Agreement for Modification of Lease and Renewal Thereof Modifying Lease dated July 1, 1918, approximately 250 acres in Warwick Co., Va. Date for Supplemental Agreement July, 1921, for 16.11 acres, Fiscal year 1923, the said letter having been delivered at this office by an officer of the U. S. A. the afternoon of June 30th, 1922.

2. The Old Dominion Land Company respectfully denies any right of lease renewal in the United States.

Very respectfully,

OLD DOMINION LAND COMPANY,
By W. B. LIVEZEY, President.

WBL/W.

(21) June 30, 1922.

SUBJECT: Renewal of Lease, Parcel No. 1, blocks 531, 549, 567, 585, 603, 621 and 639, Plat Book 1, page 3, Parcel No. 2, approximately 5-2/3 acres situate in Warwick County, Va., rental $154.75 per month, fiscal year 1923.

TO: Old Dominion Land Company, Newport News, Va.

1. In accordance with terms of the original lease, you are advised that it is the intention of the War Department to continue to occupy Parcel No. 1, blocks Nos. 531, 549, 567, 585, 603, 621 and 639 of Plat Book 1, page 3, Parcel No. 2, approximately 5-2/3 acres situate in Warwick County, Va., for the fiscal year 1923, or such part thereof as is required by the War Department.

2. Renewal Leases are being prepared and will be forwarded to you at once.

J. R. POURIE,
Lieut. Col. Q.M.C.
Commanding.

HMD:G

True Copy.

LEROY F. PAPE,
Captain, Q.M.C.

(22) June 30, 1922.

SUBJECT: Renewal of Lease, lots 26 to 32 and 41 to 48, all inclusive, in block 513, Newport News, Va., rental $27.60 per month, fiscal year 1923.

TO: Old Dominion Land Company, Newport News, Va.

1. In accordance with terms of the original lease, you are advised that it is the intention of the War Department to continue to occupy lots 25 to 32 and 41 to 48, all inclusive, in block No. 513, Newport News, Va., for the fiscal year 1923, or such part thereof as is required by the War Department.

2. Renewal leases are being prepared and will be forwarded to you at once.

J. R. POURIE,
Lieut. Col. Q.M.C.
Commanding.

HFD:G

True Copy.

LEROY F. PAPE,
Captain, Q.M.C.

(23) June 30, 1922.

SUBJECT: Renewal of Lease, land on Virginia Avenue, between 57th and 58th Streets, Newport News, Va., rental $18.67 per month, fiscal year 1923.

TO: Old Dominion Land Company, Newport News, Va.

1. In Accordance with terms of the original lease, you are advised that it is the intention of the War Department to continue to occupy land on Virginia Avenue between 57th and 58th Streets, Newport News, Va., for the fiscal year 1923, or such part thereof as is required by the War Department.

2. Renewal leases are being prepared and will be forwarded to you at once.

J. R. POURIE,
Lieut. Col. Q.M.C.
Commanding.

HMD:G

True Copy.

LEROY F. PAPE,
Captain, Q.M.C.

(24) June 30, 1922.

SUBJECT: Renewal of Supplemental Agreement for Modification of Lease and Renewal Thereof Modifying lease dated July 1, 1918, for approximately 250 acres in Warwick Co., Va., Date for Supplemental Agreement July, 1921, for 16.11 acres Fiscal year 1923.

TO: Old Dominion Land Company, Newport News, Va.

1. In accordance with terms of the original lease, you are advised that it is the intention of the War Depart-

ment to continue to occupy 16.11 acres of land in Warwick Co., Va., for fiscal year 1923 or such part thereof as is required by the War Department.

2. Renewal of Supplemental Agreement is being prepared and will be forwarded to you at once.

J. R. POURIE,
Lieut. Col. Q.M.C.
Commanding.

HMD-mlm
A True Copy.

LEROY F. PAPE,
Captain, Q.M.C.

(25)

WAR DEPARTMENT

Real Estate Service,

Office of the Chief of the Real Estate Service,

WASHINGTON

June 30, 1919.

MEMORANDUM FOR THE ASSISTANT CHIEF OF STAFF—DIRECTOR OF PURCHASE, STORAGE AND TRAFFIC:

Subject: Purchase of lands at Newport News, Va.

1. Attention is invited to the attached correspondence with reference to the above subject:

(a) Copy of letter dated August 16, 1918, from W. T. Chapin & Nelms, Inc., Newport News, Va., to the Commanding General, Port of Embarkation, in which an itemized appraisal of certain lands is set forth.

(b) Copy of letter dated August 30, 1918, from Commanding General, Port of Embarkation, forwarding above mentioned appraisal and recom-

mending that the four tracts named therein be acquired.

(c) Copy of letter dated April 28, 1919, from Chief of Construction Division to Lt. Col. James A. Blair, Assistant to the Assistant Secretary of War, setting forth the advisability of acquiring the land in question.

(d) Memorandum from the Assistant Director of Storage, concurring in the opinion that these lands should be acquired.

(e) Copy of proposal from the Old Dominion Land Company in which offer is made to sell parcels designated as 1, 2 and 3, for the sum of $218,000. Also letter from Mr. Frank Leetch, under date of June 5, 1919, in which proposal is made to sell tract No. 4 (2.66 acres), at a price of $5,670.

(f) Blue print showing the location and areas of the land in question.

2. From the above it appears that the Government has constructed improvements on the land in question to the extent of $1,995,000, as of December 31, 1918. It further appears that it will be necessary to occupy these premises for a considerable period of time during the return of troops and supplies from Europe.

3. It would seem to be to the interest of the Government, in order to protect the investment of virtually $2,000,000, to acquire the fee simple title to the lands in question. This office has conducted an investigation as to the value of the land and finds that the owners, the Old Dominion Land Company, et al, will sell for $223,670. It is believed, however, as a result of this investigation, that this price is excessive and that it will be necessary to bring condemnation proceedings.

4. Recommendation is made at this time that the fee simple title to the land above described be acquired by the United States and that the sum of $223,670. be allotted from the appropriation for Inland and Port Storage

and Shipping Facilities. Funds in this appropriation are available and it is believed that thru the condemnation proceedings the actual expenditure may be reduced below that sum.

(Signed) G. F. WOODS,
Chief, Real Estate Service.

(26) APSH:EAY

7 Encls.

Approved:

J. S. FAIR,
Colonel, General Staff,
Ass't Director of Purchase, Storage and Traffic.

Approved:

(Signed) R. B. McBRIDE,
Colonel, General Staff,
Acting Chief, Storage and Issue Branch.

Approved:

(Signed) NEWTON D. BAKER,
Secretary of War.

MOTION OF OLD DOMINION LAND COMPANY TO DISMISS PROCEEDINGS

(27) Filed February 14th, 1923.

The Old Dominion Land Company, a Corporation, by its attorney, moves to dismiss the proceedings in this case, for the following reasons:

1. The petition fails to show upon its face that the Secretary of War, or any other officer of the United States Government, had been authorized to acquire the lands and property mentioned in the petition for public use.

2. The petition fails to allege that the object of these proceedings is to complete the acquisition of real estate in respect whereof requisition notices had been served or given before July 11, 1919, or in respect whereof agreements had been made for the purchase thereof, or proceedings begun for the condemnation thereof, as required by the Acts of March 8, 1922, and July 1, 1922, respectively.

3. The petition fails to show that in the opinion of the Secretary of War, or any other officer of the United States Government, it is necessary and advantageous to the United States that the lands and property mentioned in the petition should be acquired by condemnation for the United States.

4. The petition alleges that the said lands are needed by the petitioner for the use of naval forces. The filing of the petition is stated in Section 7 thereof as in accordance with the request of the Secretary of War of the United States of America, whereas the Secretary of War has no authority under any law to determine whether it is necessary and advantageous to the United States that the said lands be acquired by condemnation for the
(28) United States for naval purposes.

5. The petition fails to set out any use of the United States for which the said lands are required with sufficient particularity to enable the Court to determine whether or not the use in question is a public use of the United States and whether or not the same have been authorized by law.

6. The petition fails to allege that the "other purposes" referred to in said petition, are public purposes and that the lands are sought to be acquired for public use.

J. WINSTON READ,
THOS. H. WILLCOX,
Counsel for Old Dominion Land Co.

R. G. BICKFORD,
General Counsel.

ORDER GRANTING LEAVE TO FILE MOTION TO STRIKE OUT CERTAIN PARTS OF AMENDED PETITION AND TO FILE DEMURRER.

(29) Entered & Filed March 17, 1923.

On motion of the Old Dominion Land Company leave is granted it to file its motion to strike out certain parts of the amended petition heretofore filed herein and its demurrer to said petition and the same are accordingly filed.

Norfolk, Virginia.

D. LAWRENCE GRONER,
U. S. District Judge.

MOTION TO STRIKE OUT AND DEMURRER

(30) Filed March 17th, 1923.

The Old Dominion Land Company, a corporation, by its attorneys craves over of the letter written by the Honorable John W. Weeks, Secretary of War, to the Honorable the Attorney General, Washington, D. C., under date of July 21, 1922, and filed with the amended petition in this case, which letter being read and made a part of the petition in this case, the said defendant now filed its demurrer to the amended petition, and for grounds of demurrer assigns the following:

1. The amended petition does not allege that the Secretary of War, or any other officer of the United States Government, has been authorized to acquire the lands and property mentioned in said petition for public use.

2. There is no allegation of the particular public use for which the said lands are required, so as to enable the Court to determine whether or not the use in question is a public use, and whether or not the same has been authorized by law.

3. The amended petition fails to allege that the object of these proceedings is to complete the acquisition of

That the Old Dominion Land Company owns the complete title to so much of Tract No. 5 as is enclosed in red on the blue print dated August 5, 1922, hereto attached "Exhibit A", and in addition to the complete title, it owns subject to the agreements which it has made with sundry parties to sell the lots tinted green lying to the Westward of Virginia Avenue and convey the same upon the payment of the purchase money, and subject to its further agreement to convey to the Newport News Light and Water Company that portion of Tract No. 5 which is enclosed in green on the blue print dated August 30, 1922, Exhibit "B" filed with this answer herein above referred to, in that the same is necessary to its purposes.

That the Court may more readily perceive the ownerships of the area lying between the Cheasapeake & Ohio Railway Company and Virginia Avenue and County Road, respectively, which the United States is endeavoring to condemn in this proceeding, the blue print dated August 30, 1922, is hereto attached, wherein the ownership of the Old Dominion Land Company is enclosed in red lines; the ownership of easements of the Newport News Light and Water Company is outlined in yellow; the ownership of the McLean tract is tinted in brown: the lands which the Old Dominion Land Company is obligated to convey to the Newport News Light and Water Company are outlined in green; and the areas wherein Tract No. 5 overlaps Tracts Nos. 1 and 2 are cross-hatched in red lines.

But it is not true that the land described in the petition has been occupied by the petitioners under a lease from the owners thereof, except so far as the same is described under the several leases hereto attached marked Exhibit "C to I" nor is it true that the lands covered by these proceedings are needed by petitioners for a site for quartermaster warehouses for the use of naval and military purposes or for inland or port storage and for shipping facilities or for public buildings desired by the United States, or for any other public purpose. The (34) Secretary of War is not authorized, as will be hereafter more fully shown to acquire the land involved in the condemnation proceedings for any of the purposes involved in the said second paragraph. The terms of the second allegation of the petition are inclusive of a private and speculative purpose of the Government,

which unlawful purpose, this respondent alleges is the sole cause for the institution of this proceeding. And this respondent further alleges that the public purposes which are alleged as a ground for these proceedings are not authorized by law.

THIRD: The name of this respondent is the "Old Dominion Land Company", and its principal office is at the Hotel Warwick in the City of Newport News, Virginia. The principal office of the Newport News Light and Water Company is located in the Hotel Warwick, Newport News, Virginia.

FOURTH: Respondent believes that the interest in respondent's lands hereinabove described which the petition seeks to take under these proceedings, is a fee-simple interest, but the description of the property in Exhibit "C", (as in other exhibits) is erroneous, as has been hereinbefore pointed out.

FIFTH: It is not true that the petitioner has endeavored to acquire the lands indicated but incorrectly described in the condemnation proceedings. The petitioner has never made any offer for the land described in Tract No. 5. It has never entered into any negotiation looking toward the purchase thereof. That the land comprised in Tract No. 5 includes public roads, streets, trolley lines, sewer and gas mains and electric light lines, City Water pumping station and reservoirs and the only highway leading from the City of Newport News to Williamsburg and Richmond, on the extension of which highway the State has spent and has arranged to spend large sums of money. Tract No. 5 also comprises the best residential section of the City, on which many handsome and expensive residences have been erected. The land contained within this Tract has never been known or denominated as warehouse lands, nor have they or any of them been occupied as warehouses, or for any purpose connected therewith, or relating thereto. No authority or color of authority has been given to the Secretary of War, or any other public officer, to purchase (35) any portion of the said Tract. That upon that portion of Tract No. 5 between a point half-way between 59th and 60th Streets, and a point half-way between 61st

and 62nd Streets, has been erected a three and a half million gallon concrete reservoir and an extension of the power house of the Newport News Light and Water Company, as well as the extension of the wood stave main running along Virginia Avenue hereinabove referred to; that these properties were never used in connection with the warehouses and the Newport News Light and Water Company has contracted with the Government to purchase the same, and has paid a large amount of the purchase consideration thereon. That no authority or color of authority exists in the petitioners for the condemnation of any part of that portion of Tract No. 5, lying between Virginia Avenue and the Chesapeake & Ohio Railway, nor any power to condemn any portion of Virginia Avenue or any of the public works upon the same. Nor has this respondent at any time been advised of any desire of the War Department to purchase any portion of the lands involved in Tract No. 5.

Further answering Allegation 5, this respondent declares that the only offer that has been made to this respondent for the purchase of its land was contained in a letter from J. M. Carson, Assistant Quartermaster General, on July 19, 1922, a copy whereof is hereto attached marked Exhibit "J", in which letter the United States offered to purchase the "Lands of the Old Dominion Land Company now occupied by the Quartermaster houses, known as Groups 2 and 3, and the utilities serving the same at Newport News, Virginia, at the rate of THREE THOUSAND ($3,000.00) per acre, the exact acreage and description of the lands sought to be acquired to be determined by survey."

On July 24, 1922, W. B. Livezey, President of the Old (36) Dominion Land Company, answered the above letter, stating that the matter would be referred to the Board of Directors of the respondent company, pointing out, however, that a portion of, the land had been platted and would have to be sold by the plat, while property not so platted might be sold by the acre, but informing General Carson that in his judgment the price offered was much less than the value of the land, a copy of which said letter is hereto attached marked Exhibit "K."

The Board of Directors of the Old Dominion Land Company met in New York on July 28th, when the Board refused to accept the offer of THREE THOUSAND

DOLLARS ($3,000.) per acre, of which action of the Board, General Carson was advised by respondent Company by the letter of W. B. Livezey, its President, dated July 31, 1922, a copy whereof is hereto attached, Ex. "L."

That the petition for condemnation purports to have been filed July 29th, or two days before the date of the letter notifying General Carson of the unwillingness of the Land Company to accept the Governments offer.

Further answering Paragraph 5 of the petition, respondent states that it is not true that the petitioners are either willing or ready to pay damages to persons affected by the proposed condemnation, since no authority to purchase a large portion of the land, and no authority to condemn any of it has ever been given by Congress, nor any appropriations therefor been made, as will be hereinafter set forth.

SIXTH: It is not true that all of the property sought to be condemned in this proceeding is real estate, for, as pointed out, a large portion consists in franchises, easements, rights-of-way, public City and State roads, but it is true that all of the real estate is in the County of Warwick and in the City of Newport News, and is in the (37) Eastern Judicial District of the State of Virginia; and as to all private ownership is within the jurisdiction of the District Court of the United States for the Eastern District of Virginia, and within the Norfolk Division of the said District, but it is not true that the metes and bounds are correctly set forth in Exhibits "B" and "C" of the petition, nor is it true that any memorandum filed with the petition shows the names and residences of owners or persons having rights, title estate or claim or interest in the land described as Tract No. 5.

SEVENTH: It is not true that the petition was filed, nor that the condemnation proceedings were instituted under or by authority of the Act of CONGRESS referred to in the petition.

That on the contrary, the Act of August 1, 1888, authorizing condemnation in certain cases, has no application to these proceedings for the following reasons:

"1. The Statute, so far as it authorizes condemnation for public buildings, contemplates a site "for the erection" of a building—it does not contemplate the condemnation of a site whereon a public building is already located. The Secretary of War has no authority under any of the Acts cited in the petition to erect any public building, therefore, in that respect there is no right in the Government to maintain these proceedings."

2. The Act of August 1, 1888, does not authorize condemnation for "other purposes", which are alleged as justification of these proceedings in the second paragraph of the petition, but for *other public purposes.*

Further answering the Seventh allegation, respondent says that neither the Act of March 8, 1922, nor the resulting appropriation Act of July 1, 1922, referred to in Government's petition as a ground therefor, apply to the land of this respondent which the petitioner seeks to condemn in these proceedings, for the following reasons:

(a) The Act of March 8, 1922, is only intended to (38) authorize completion of the acquisition of real estate in cases where requisition notices had been served or given before July 11, 1919, or agreements had been made prior to that date for the purchase thereof, or proceedings begun prior to that date for the condemnation thereof.

(b) Respondent alleges that no requisition notices for the said lands or any part of them had been given, or agreement for the said lands or any part of them had been made, or proceeding for the condemnation of said land or any part of them had been begun, prior to July 11, 1919, nor have any of these things been done at any date prior or since the institution of these proceedings.

(c) That if the Act of March 8, 1922, alleged by the petitioner as a ground for these proceedings, had in fact and law extended thereto, that Act would have been unconstitutional and void in the limitation placed upon the compensation for the premises by the proviso of Section 3 thereof, which is as follows:

"provided, however, that any additions to the value of the premises resulting from the improvements thereto or in the vicinity thereof, made by or at the expense of the United States, shall be excluded from the sum paid to or recovered by the owners."

Respondent alleges that by whatever legal means the value of its lands have been enhanced, respondent is in law and justice entitled to recover that enhancement, and any attempt to take away this right is unconstitutional and void, under the Constitution of United States and especially the 14th Amendment thereto, and that no law containing any such limitation upon the rights of this respondent or upon the jurisdiction of the courts as (39) to the measure of just compensation will justify any recourse to proceedings for condemnation.

(d) Respondent alleges that before the Secretary of War sought the authority given by the Act of March 8, 1922, and the resulting appropriation of the Act of July 1, 1922, the Secretary had determined that the warehouses situated upon the land which it is now sought to condemn, were unnecessary for any public purposes, and through his duly authorized officers, declared to the Sub-Committee of the Committee of Military Affairs, before whom H. R. 7158, subsequently enacted into law on March 8, 1922, that the said warehouses had been vacated and were no longer required for military purposes, but that it was sought to purchase the land upon which the same were located in order that the same could be leased or sold on better terms than would otherwise be possible, to commercial interests as soon as Congress appropriates funds and authorizes the purchase of the land in order to complete the title of Government ownership—all of which is set forth in the hearing before a Sub-Committee of the Committee of Military Affairs, entitled "Real Estate—To complete acquisition in certain Cases" beginning on the 23rd day of May, 1921, and concluding on the 25th day of May, 1921, a copy of which is filed marked Exhibit ———.

(e) That on page 98 of the Hearings aforesaid will be found a description of the quartermaster warehouses

at Newport News, for the purchase of which lands the appropriation was made showing:

"Norfolk General Intermediate Depot (Warehouse Groups 1, 2 and 3, Newport News).

Location: Group 1 located centrally with respect to Camp Stuart and Camp Hill at Twenty-sixth Street and Jefferson Avenue. Groups 2 and 3 occupy a narrow strip of land between Virginia Avenue and the Chesapeake & Ohio Railroad extending North of Fiftieth Street.

Acreage: Government owned; 2.752; leased, 41.35; (40) total, 44.102.

When acquired: During the war.

Armament: None.

Character of improvements: Group 1, Government owned; 2 large frame warehouses, 148 by 180 feet on concrete foundations; 3 frame barracks; 1 large brick building. Group 2, Government installations on leased land, 7 large frame warehouses 100 by 200 feet with concrete floors.

Accommodation of troops and officers: For operating personnel only.

Storage space: Group 1, warehouse, 27,000 square feet; Groups 2 and 3, warehouse, 390,000 square feet.

Total investment: Approximately $1,995,000 (included in total cost of $13,249,286.83 of Norfolk General Intermediate Depot).

Garrison: None.

Activities and purpose: Acquired during the war for the supply of troops in the vicinity and as a necessary part of the Norfolk Army Supply Base in connection with the shipment of supplies to Europe during the war. Group 1 (Government owned) is filled with reserve supplies needed for the Army and contains also a cold-storage plant which furnishes cold-storage facilities to posts and stations supplies by the Norfolk General Intermediate Depot. Groups 2 and 3 were completely evacuated of supplies January 31, 1921.

Recommendation: That Group 1 be retained and that Groups 2 and 3 be sold or leased to commercial interests as soon as Congress appropriates funds and authorizes

purchase of the land in order to complete the title of Government ownership."

This respondent is informed, believes and charges that some days prior to July 29th, 1922, the War Department tendered a lease of the said warehouses to certain Norfolk interests, the exact terms of which lease are unknown to respondent but the production of which by appropriate legal methods should be required by this Honorable Court.

Respondent further avers that some days prior to July 29, 1922, the War Department had granted an option to certain parties to this respondent unknown, to sell the said warehouses and the land upon which the same were situate in the event that the United States succeeded in acquiring title to the same by the present condemnation proceedings which were then contemplated the produc-
(41) tion of which option and the parties to whom given should, by appropriate legal methods, be required by this Honorable Court.

This respondent further avers that the City of Newport News, is built upon land originally acquired by this respondent and by this respondent was platted into lots and blocks for the purpose of creating the present City, and that this respondent at present is the largest land holder in the City of Newport News and its environs. That the success or failure of the investment of this respondent in its land ownership aforesaid depends upon the development of the terminal facilities of the Chesapeake & Ohio Railway Company located at Newport News; that the warehouse land which the Government now seeks to acquire is essential to the said development; that the City of Norfolk, so far as its warehouses and shipping facilities are concerned, is a competitive community, which should not be permitted to add to its own resources those of the port of Newport News, and that if the same is permitted, it will be at the great cost and disadvantage of the City of Newport News, and to the great injury of this respondent. That this respondent believes and avers that the sovereign right of condemnation ought not and cannot be legally invoked to advance the interests of one community over that of another.

Finally, this respondent denies that in the opinion of

the Secretary of War, or any other officer of the United States Government thereunto authorized, it is necessary or advantageous to the United States that the property in controversy be acquired by condemnation under judicial process for the United States; and if any declaration to such effect was made by any officer of the Government, the same was improvidently made, and without any just regard to the constitutional duties, obligations and limitations of the exercise of this power by the United States. The production of any such declaration is hereby demanded.

And now having fully answered, this respondent prays that the said petition be dismissed and that respondent recover of petitioner its reasonable costs in this behalf expended. And it will ever pray, etc.

OLD DOMINION LAND COMPANY,
a Corporation.
By W. B. LIVEZEY, President.

(Seal)

R. G. BICKFORD,
J. WINSTON READ,
Attorneys.

(42)

Virginia:
City of Newport News, to-wit:

This day personally appeared before me, the undersigned, a Notary Public of and for the City aforesaid, in the State of Virginia, W. B. LIVEZEY, who made oath and says that he is President of the Old Dominion Land Company, a Corporation, and that the allegations of its foregoing answer are true to the best of his information, knowledge and belief.

Given under my hand this 13th day of September, 1922.

JESSIE M. HUDGINS,
Notary Public.

My Commission Expires February 14, 1923.

EXHIBIT "I" (a)

(43) Filed with answer.

SUPPLEMENTAL AGREEMENT FOR MODIFICATION OF LEASE AND RENEWAL THEREOF:

BETWEEN: C. F. VON DEM BUSSCHE, MAJOR, QUARTERMASTER CORPS, U. S. A.
AND: OLD DOMINION LAND COMPANY, a corporation existing under the laws of the State of Virginia.
MODIFYING: Lease dated July 1, 1918.
FOR: Approximately 250 acres in Warwick County, Virginia.
APPROPRIATION: B. & Q. FISCAL YEAR 1919.
DATE OF SUPPLEMENTAL AGREEMENT: July 1, 1921.

Whereas, on July 1, 1918, a lease was entered into between the United States, represented by Jno. T. Knight Colonel Quartermaster Corps, U. S. Army, for and in behalf of the United States of America, and the Old Dominion Land Company, a corporation existing under the laws of the State of Virginia, for the leasing of two (2) parcels of land in Warwick County, Virginia, containing approximately two hundred fifty (250) acres, and more particularly described in said lease:

And whereas, the greater portion of said premises are no longer required by the United States;

And whereas, the lessor in letter dated June 28, 1920, has consented to an apportionment of said lease with renewal privilege to permit a new lease from July 1, 1921, to cover only such portions of the land where the warehouses are;

And whereas, all of said lands except the portion occupied by the warehouses of the lessee, and the switch tracks and other facilities used in connection therewith, have been returned to the lessor as of July 1, 1921;

Now, therefore, in consideration of the premises, and in consideration of the surrender of the lands described in said original lease, except the following described tracts of land:

Tract No. 1: Starting at a point on the westerly line of the right-of-way of the C. & O. Railway Company, where the same is intersected by the northerly line of 64th Street projected, and running thence north 26 degrees 23 minutes West 2080 feet more or less, to a point on the southerly line of the McLean tract, thence along the said southerly line of the McLean tract S. 46 degrees west, to the east line of Virginia Avenue projected; thence southerly along the east line of Virginia Avenue, to the north line of 54th Street; thence easterly to the place of beginning.

Tract No. 2: Beginning at the intersection of the northerly line of the McLean Tract and the westerly line of the right of way of the C. & O. Railway; thence westerly along the said northerly line of the McLean Tract a distance of 100 minutes to a point; thence north 0 degrees 22 minutes east 160.26 feet to the westerly line of the right of way of the C. & O. Railway; thence along said westerly line of said right of way 100′ to place of (44) beginning, containing .11 acres more or less.

It is mutually covenanted and agreed between the parties hereto that said lease, with all its covenants and agreement, be and the same is hereby renewed and extended to cover the tracts of land above described, containing approximately Sixteen and eleven one hundredths (16.11) acres of land, more or less, for the term beginning July 1, 1921, and expiring June 30th, 1922; and the rental therefor shall be $5.00 per annum, upon the same terms and with the same covenants and conditions as set forth in the said lease hereby renewed, so far as applicable.

In witness whereof, the parties aforesaid have hereunto placed their hands this first day of July, 1921.

The officer of the United States whose name is signed below, certified that the rent stated in this renewal is not

in excess of the commercial rental value of the premises named, and that said rent is the amount to be actually paid to the lessor for its own use; and that there are no public buildings, quarters or grounds available for use as specified in this lease; and that the rental stipulated in this lease is a nominal rental value for reasonably good premises suitable for the purposes stated herein in the locality where situated.

(S) C. F. VON DEM BUSSCHE,
Major Quartermaster Corps, U. S. Army.

OLD DOMINION LAND COMPANY,
By (S) W. B. LIVEZEY, President.

Witnesses:

(S) ROBERT B. BENNETT.

ATTEST:

(S) MALCOLM NEXSEN,
Asst. Secretary.
(SEAL)

EXHIBIT "J" FILED WITH ANSWER

(45) Filed with answer.

WAR DEPARTMENT
Office of the Quartermaster General of the Army
Washington, D. C.

July 19, 1922.

K-RE-601.1-
Newport News, Va.,
Quartermaster WHSES)

Old Dominion Land Company,
61 Broadway,
New York City.

Gentlemen:—

The Quartermaster General directs me to acknowledge

receipt of your letter of June 30th, 1922, confirming telegram of same date. It is noted that you therein contend there is no right of renewal in the leases covering the land now occupied by the Quartermaster Warehouses, known as Groups 2 and 3, and the utilities serving them, and that the United States has thirty days from June 30, 1922, in which to remove all of its improvements.

You are advised that it is still the intention of the United States to purchase these lands. Funds for such purpose are now available and the acquisition of the fee simple title to the said lands has been approved and authorized.

The United States therefore formally offers to purchase the lands of the Old Dominion Land Company, now occupied by the Quartermaster Warehouses, known as Groups 2 and 3, and the utilities serving the same at Newport News, Virginia, at the rate of $3,000.00 per acre, the exact acreage and description of the land sought to be acquired to be determined by survey.

Please advise this office at the earliest time possible whether or not this offer is accepted. In the event that it is, the Government is prepared to take immediate steps to consummate the purchase.

Very truly yours,

J. M. CARSON,
Assistant Quartermaster General.

EXHIBIT "K" FILED WITH ANSWER

(46) Filed with answer.

COPY

OLD DOMINION LAND COMPANY

July 24, 1922.

Brigadier General J. M. Carson,
Assistant Quartermaster General,
War Department,
Washington, D. C.

Sir:

1. I beg to acknowledge receipt of your letter dated

July 19, 1922, which did not reach me until July 20, 1922, due perhaps to irregular mail service.

2. Upon the receipt of your letter, a meeting of the Directors of the Old Dominion Land Company was called for Friday, the 28th inst., to consider what action should be taken with respect to your offer to purchase. This course is necessary because my own powers with respect to this property, whether as to sale or lease, have been terminated and I have been instructed that the Company would stand upon its legal rights.

3. I will advise you of the action of the Directors after the meeting on Friday.

4. I take this occasion, however, to point out that some of this property is acreage property and some has been platted into city lots,— that which has been so platted, if sold, will have to be sold by the plat. The portion not so platted may be sold by the acre.

5. Though, as stated, I am entirely without authority in this matter at this time, I may state to you that I regard the price which you offer for the property as very much less than its value,—however, that is a matter which the Board of Directors must determine.

Respectfully,

WBL/W President.

EXHIBIT "L" FILED ANSWER

(47) Filed with answer.

COPY

OLD DOMINION LAND COMPANY

July 31, 1922.

Brigadier General J. M. Carson,
Assistant Quartermaster General,
War Department,
Washington, D. C.

Sir:

1. As indicated in my letter of July 24th, 1922, I have the honor to advise that the Board of Directors of the

Old Dominion Land Company, at its meeting held in New York on Friday, July 28th, had before it for consideration your letter of July 19th. The Board declined to accept your offer of $3,000.00 per acre contained in said letter, and I was authorized to thus inform you.

Very respectfully,

OLD DOMINION LAND COMPANY,
By (S) W. B. LIVEZEY, President.

WBL/W.

OPINION OF THE COURT

(48) Filed April 25, 1923.

GRONER, District Judge,—from the Bench.

I have given such consideration as possible since the adjournment last night, to the questions which were discussed very earnestly and very learnedly yesterday in the argument, and having reached a conclusion, I think perhaps it would be better if we started the proceedings here today with knowledge on all hands as to my views in the matters that were raised yesterday.

The questions which were argued yesterday go to the root of the whole proceedings. If the position of the defendant that the property sought to be taken in these proceedings is not to be taken for a public use as required by the statute, then, of course, it follows that there ought not to be any proceedings had to determine the value and that would foreclose a further consideration of the case.

The situation briefly described is about as follows: During the early stages of the war, the United States secured leases from the defendant for various parcels of land lying along the Chesapeake & Ohio right of way in Newport News for the military purposes of the Government and particularly in connection with the use of Newport News as a port of embarkation. These parcels of land were utilized by the Government for the erection, as I recall the evidence, of twenty-one warehouses built,

(49) at least as to their foundations and as to every thing except the super-structure, of a permanent character and that, as described by one of the witnesses, of a semi-permanent character and used during the period of the war strictly and entirely and exclusively for the military purposes of the Government. The lease or leases were originally for one year. I have forgotten the details as to whether the renewal that thereafter ensued from year to year was by consent of parties or by virtue of the contract itself, but that is immaterial. The fact is that the leases were renewed until the first of July, 1922, I think. One of the terms of the leases gave the United States the right to remove any structures or improvements placed on the property either during the period of the lease or for a period of thirty days after the termination of the lease.

The Government did build these twenty-one warehouses and did not remove them during the period of the lease and at or near the conclusion of the lease, in July or in June, 1922, after an effort had been made and had failed to secure a renewal of the lease, the defendant notified the Government to deliver the premises at the expiration of the thirty days grace and thereupon some negotiations were had with a view to the purchase of the property, but these were unsuccessful, and on the 29th of July, within the thirty day period and while the Government was still in possession and lawful possession of the property, these condemnation proceedings were begun and they were begun as the result of two Acts of Congress and the request on the part of the Secretary of War to the Attorney General in the usual form, certifying to the necessity of the taking of the property and requesting the Attorney General to institute proceedings to that end.

The defendant denies the right of the Government to institute or continue these condemnation proceedings, because it says that the use to which the Government (50) purposes putting the property and the use for which it is taking the property is not a public use, that the conditions precedent to the condemnation proceedings required by the act itself have not been complied with, that there has never been a bona fide effort to acquire the property by purchase and, therefore, an inability to agree upon the purchase price and that if the

proceedings ought to continue it ought to be entitled to have the jury not only determine the value of the fee in the land, but as well the improvements since erected by the Government.

These questions are important and, of course, the order of their importance is perhaps the order in which I have stated them. If there is no public use, if the taking of the property is for a private use and that fact has been made to appear, then it follows, under the Constitution, there ought not to be any taking at all. The question has given me, I am frank to say, some concern, but such an examination of the authorities as I have been able to make and the fact that the Government rather than a private individual or a corporation, clothed by virtue of the law with eminent domain is the petitioner in this case, has led me to conclude that I am bound by the recitals and conditions stated in the Act of Congress. The first act was the Act of March 8, 1922, which was entitled "An Act to Amend the Army Appropriation Act of July 11, 1919, so as to Release Appropriation for the Completion of Acquisition of Real Estate in Certain Cases and Making Additional Appropriations Therefor." The enacting part of the act itself recites that the provisions of the Army Appropriation Act approved July 11, 1919, making unavailable, with certain exceptions, the appropriations for the support of the army and military establishment of the purchase of real estate as amended by the act approved February 20, 1920, be and the same are hereby further amended so as to authorize completion of the acquisition of the real estate hereinafter specified in respect whereof requisition notices have (51) been served," etc. Then follows a number of properties which the Government is seeking to acquire located in various parts of the country, but among them "Quartermaster warehouses, Newport News, Virginia." There is no question that that language described the property sought to be condemned in these proceedings, so there is no difficulty about the identification of the property and the fact that it was the property which is sought to be taken in these proceedings, that Congress was legislating as to in this particular act. That act was followed by the passage of the General Deficiency Bill approved July 1, 1922, in which, under the title "War Department, Quartermaster Corps" the act re-

cites as follows: "Sites for military purposes for the completion of acquisition of real estate as authorized by the Act approved March 8, 1922," and then follows in order, after the enumeration of any number of other similar properties, "Quartermaster warehouses, Newport News, Virginia." Taking those two acts in connection with the general authority given by the Condemnation Act of 1888 in which the Secretary of War or Secretary of the Treasury is authorized to condemn for the public use any properties which Congress may appropriate money to acquire and in such cases as in his discretion, he thinks such proceedings necessary for that purpose, I think there can be no doubt that there has been in this case the passage by Congress of the proper and necessary and sufficient laws to justify the acquisition by Congress of this particular property and I feel also that these particular acts sufficiently certify the character of use for which the property is desired.

The evidence taken yesterday indicated with almost unanswerable persuasiveness that the real purpose was not the use of these warehouses for Government purposes. The implication was almost irresistible that the Government had determined or at least that the execu-
(52) tive officers charged with the administration of government affairs in that direction, had determined that their use for these purposes was no longer necessary and that the real purpose was to save the very large amount of money which the Government had invested in the improvements to the property. As to that it may be said that while that may be the position, opinion, or viewpoint of the executive officers of the Government, including the Secretary of War at the present time, it is undeniably a fact that none of the things which apparently they seek to accomplish or wish to accomplish or purpose accomplishing may be accomplished without an Act of Congress and there is no act of Congress at the present time which would authorize them to do anything else with this property than to use it for the purposes for which Congress has appropriated the money for its taking. Congress may be of the opinion at a later date that their view ought to prevail and that the property ought to be sold or leased or used for some purely commercial enterprise, some private purpose. It doesn't follow, however, necessarily that that will be the

outcome. It may, on the contrary, have an entirely different point of view after the property is acquired. Exigencies may arise by which it may be necessary for the public use and until and unless Congress itself announces some determination from which a court may ascertain that the use is not a public use, particularly when the affirmative of that proposition is already stated by Congress, it seems to me it perhaps is not a subject which may be judicially reviewed.

If the Act in this case recited that the United States Government during the war period had found it necessary to spend on this property and the improvement of this property a vast amount of money which it thought proper, reasonable and right for Congress to attempt to save by acquisition of the property and that therefore (53) this appropriation was made in order that Congress might accomplish those results, I am disposed to think that the court might, under those circumstances, have determined whether that was a public use or not, but to allow evidence of the acts of the executive branch of the Government as indicative of its purpose, to negative the solemn statement of the Act of Congress itself would, it seems to me, to be the equivalent of saying that what Congress has stated to be a fact was not, in fact true and that, of course, would be unseemly and destructive of the independence of the different branches of the Government which the theory of our Constitution seeks to uphold.

In the case which was mentioned at the conclusion of the argument last night, United States v. Forbes, Judge Clayton, himself for many years a distinguished member of Congress, author of some of the present laws most generally quoted and in use, and I have no doubt a jurist of very excellent learning, states in Forbes' case, 259 Federal, 589, that there is a distinction between cases in which taking is by private corporation and taking by the Government, that in the first place, that is in the class of private corporations, the necessity for condemnation is a question for judicial determination. In the other class,—taking by the Government—the necessity is not for judicial determination. The power is bestowed by Congress on the Secretary of War and the Secretary of the Treasury or any other of the Secretaries who are authorized to do the particular thing, and that such dis-

cretion is not reviewable in the court. I am very doubtful whether that is altogether an accurate statement of the law. I can very readily conceive that there could be, even where the taking was by an act of Congress, such an apparent palpable taking for private use as would justify a court in reviewing that question, but in this case the only person who is authorized to speak as to the taking is Congress, and the only person who is authorized to speak as to the disposition of the property (54) after it is taken is Congress. The opinions of the subordinate or executive officers of the Government, while doubtless in a large degree controlling, still are not any more than their own private views and private opinions unless Congress has spoken and in this case Congress has spoken only in one respect, that is to say has certified by the passage of an act that the necessity does exist.

The character of the buildings is such, as of themselves, to be susceptible of the use to which it is stated they are to be applied, so that under those circumstances my judgment is that the motion to dismiss the petition on that ground ought to be over-ruled.

The second ground is that the act provided for the acquisition of this particular property only under certain conditions, namely that the requisition notices had been served prior to July 11, 1919, or agreements made for purchase or condemnation begun. It is certainly true that none of those three things has been done in this case. There had been no requisition notices issued, no condemnation begun and no agreement to purchase and if the act itself had stopped there and the Secretary of War had certified that this particular property was one of the properties which it was desired to acquire by condemnation proceedings under this Act, I think the court would have a right to say and it would be its duty to say that in the absence of those things there was a failure to identify this property as property which Congress intended to acquire, but in spite of the failure of all those things of which Congress must have been presumed to have had notice, there is this specific, definite, positive recital that this particular property, this identical property, is desired by the Government and ought to be taken. There is a further reiteration of that purpose of Congress to take this particular property in the subsequent

Act of July 1st so that it would seem to me that in view (55) of the identification of this property as property desired by the Government, in view of the certification of that fact by the Secretary of War to the Attorney General and made a part of the petition in this case, that that language should be considered as surplusage in this case and not controlling or at least as not of such a character as may be taken advantage of by the defendant, so I pass from that point. The third question of the negotiations to purchase I think substantially is waived except in the argument it was insisted that this particular act under which we are proceeding requires these condemnation proceedings to be begun only after the effort to agree on a price had failed. I think that the act is not susceptible of that construction, in the first place, and even if it were, I think that the offer made by the Government, while it was still in lawful possession, of a certain definite price for the purchase of the property and the refusal of that price probably brings it within the rule even if that were necessary to be shown as a condition precedent to the commencement and continuation of the proceedings. There was an offer made. The bona fides of that offer, it is true, have been attacked. The offer apparently was substantially in line with a price fixed by the owners of the property themselves some three or four years prior to this time. The Government, of course, does not act with the celerity in matters of this kind that private individuals or private corporations act. It has a vast number of details to attend to and courts, I think, are always willing to yield to it a certain degree of decretion and forbearance in carrying out matters of this character. The offer was made and while it was declined and declined because it was believed to be too low, still it was made during the period when the period of grace had not expired, so that my judgment is that as to that point the proceedings are properly here.

The question of whether the improvements should be (56) valued I have no question in my mind about, because I have been unable to find any case in which under conditions like this the improvements have been included in the value of the property sought to be taken where they were made by the lessee and particularly where they were made by the lessees with a reservation of title

to them during the period of the lease. I think the courts have gone so far as to hold that even in the case of trespass where the occupancy of the land was without the authority of the land owner at all, the improvements placed thereon, when the property was condemned, that is to say where the improvements were made by a person possessing the right of eminent domain, that when the condemnations were begun the improvements were not included in the value which make up just compensation. In this case the Government has specifically the right to remove improvements and to have sold them if it pleased, or removed them if it pleased at any time up to the expiration of its lease period. Whether if it had allowed the time to lapse and the common law rule to apply that property attached to a free-hold becomes the property of the owner of the free-hold is not necessary to be decided in this case. Fortunately for the Government, the condemnation proceedings were begun July 29th and during the period when the Government, as I stated in the first instance, was in control and in lawful possession of the property. The decisions seem to be so clearly unanimous that under such circumstances the value of the improvements ought not to be included in the award, that I feel it clearly encumbent on me in this case to eliminate that item or that element from the consideration of the jury when they come to make their award.

So, gentlemen, on the whole case I over-rule the motion to dismiss the proceedings on the various grounds and strike out the evidence, and, of course, give the defendant exception to my ruling in those respects.

Mr. Read: We except to the ruling of the Court as
(57) to each of these preliminary issues.

ORDER ON TRIAL

(58) Entered April 25th, 1923.

This day came the United States of America, by their Attorneys, and defendant, Old Dominion Land Company, by its Attorneys, and thereupon the said defendant moved to strike out and reject the letter of the Secre-

tary of War under date of July 1, 1922, filed with amended petition in this case, and to dismiss said amended petition for the reasons set out in its written motion; but the Court overruled said motion, to which ruling of the Court the defendant excepted, and the said defendant likewise filed its demurrer in writing to the said amended petition, which demurrer being argued, the Court overruled the same, to which ruling of the Court the defendant, by its attorneys, excepted, and thereupon it was agreed between counsel for petitioner and defendant that the answer of the said defendant to the original petition should likewise be considered as filed to the amended petition.

And by like consent of attorneys for the petitioner and defendant, certain issues raised by the pleadings were submitted to the Court for its decision, as follows:

1. Whether the lands and property mentioned in the petition were sought to be taken by the United States for the public use.

2. Whether the Secretary of War, or any other officer of the United States Government, has been authorized to acquire the said lands and property for public use.

3. Whether certain alleged requisites to condemnation as set out in the Acts of Congress of March 8, 1922, and July 1, 1922, respectively, existed in the case at bar, the contention of the defendant being that such Acts (59) only authorized condemnation to complete the acquisition of real estate in respect whereof requisition notices had been served or given before July 11, 1919, or in respect whereof agreement had been made for the purchase thereof, or proceedings begun for the condemnation thereof.

4. Whether there had been failure or inability to agree with the owner as to purchase of the land sought to be condemned, prior to the institution of this proceeding;

5. Whether the value of the warehouses constructed by the United States Government on the lands sought to be condemned, should be included in the valuation of

said lands in event the Court should hold condemnation proceedings were authorized and proper in the case at bar.

Whereupon petitioners offered their evidence in support of the allegations of their petition as amended, and defendant offered its evidence in support of the allegations of its answer, to all of which said evidence so offered by the defendant, the United States of America, by their attorneys, duly objected, on the grounds that said evidence so offered by defendant was immaterial, irrelevant, and incompetent, which said evidence was received by the Court, subject to the said objections of the petitioners; the questions involved having been argued at length by the attorneys for the petitioners and defendant respectively, the Court took the same under advisement and adjourned until April 26th, 1923, at 10:30 A. M.

D. LAWRENCE GRONER,
U. S. Judge.

ORDER ON TRIAL

(60) Entered April 26th, 1923.

This day came again the United States of America, by their attorneys, and defendant, Old Dominion Land Company, by its attorneys, and the Court having maturely considered the preliminary issues heretofore submitted to it, for the reasons stated in its opinion filed herein as a part of this record, is of the opinion that the Secretary of War was authorized to acquire the lands and property mentioned in the petition.

To which ruling of the Court the defendant, by counsel, excepted, and thereupon the United States of America, through their attorneys, requested that a jury be empanelled to ascertain just compensation to said defendant, Old Dominion Land Company, for each of the said several tracts or parcels of land sought to be condemned by the United States of America in these pro-

ceedings, which said tracts or parcels of land are known and designated herein as tracts numbers One (1), Two (2), and Four (4), in which said request, the defendant, Old Dominion Land Company, by counsel, joined;

And thereupon a panel of twenty special jurors, summoned by the Marshal pursuant to the order of the Court and in attendance on the Court, were examined by the Court, found free from legal exception and qualified to serve according to law, and from said panel of twenty jurors sixteen were duly chosen according to law, and the Attorney for the United States of America, and for the defendant respectively, struck from the said panel of sixteen, two jurors each, leaving twelve remaining, to-wit, Julian Osborne, T. H. Birdsong, L. T. Dobie, Thomas P. Duncan, C. W. Grandy, R. L. Spencer, George W. Roper, Goldsborough Serpell, F. M. Killam, W. H. Gary, E. C. Cheshire and Charles Hewins, who were duly sworn according to law faithfully and impartially to ascertain just compensation to the said defendant for each of the several tracts of land, or of the estate or interest of the defendant therein, as designated and described in the petition of the United States of America in these proceedings, and the damages, if any, to the adjacent or other property of the defendant, beyond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of petitioner's works, by reason of the taking of said lands or the state or interest of the defendant therein, and a true verdict give according to the evidence.

And thereupon the jury having heard all the evidence offered by the petitioners and defendant, respectively, as to what would be just compensation for said lands of the defendant, including damages, if any, to adjacent or other property of the defendant beyond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of petitioners works, and counsel for petitioners and defendant respectively, having argued the case, the jury retired to their room to consult of their verdict, and after some time, returned into court, having agreed upon a verdict, which verdict (61) was duly received by the Court, according to law and is in the following words and figures to-wit:

"We, the Jury, being sworn faithfully and impartially to ascertain what will be just compensation to the Defendant for the three parcels of land in these proceedings mentioned, (Subject to the right-of-way of N. N. L. & Water Co.), after hearing the evidence ascertain that for the land to be taken belonging to the Defendant, Old Dominion Land Company just compensation will be as follows:

TRACT NO. 1.

All that certain tract or parcel of land situate in the City of Newport News, Virginia, and in the County of Warwick immediately adjoining the corporate limits of the City of Newport News, Virginia ,and more particularly bounded and described as a whole as follows:

Beginning at a point, said point being in the east line of Virginia Avenue at its intersection with the north line of fifty-eighth (58th) Street, and being north sixty three degrees, thirty seven minutes east (N-63 deg. 37′ -E.) and distant eighty and no hundredths (80.00) feet from a stone monument at the intersection of the west line of Virginia Avenue and the north line of fifty eighth (58th) street, and running thence (1) north sixty three degrees thirty seven minutes east (N-63 deg. 37′-E) along the said north line of fifty eight (58th) street a distance of three hundred and forty nine and eighty eight one hundredths (349.88) feet to a point, said point being in the westerly right of way line of the Chesapeake and Ohio Railway Company; thence, (2) south twenty six degrees, twenty three minutes east (S-26. deg. 23′ E) along the said right of way line a distance of two thousand one hundred and forty and thirty one one hundredths (2140.31) feet to a point, said point being in the south line of fiftieth (50th) street, thence (3) south sixty three degrees, thirty seven minutes west (S-63 deg. 37′ W) along said south line of fiftieth (50) street a distance of fifty and no one hundredths (50.00) feet to a point, said point being also in the said westerly right of way line to the C. & O. Ry. Co. thence, (4) south twenty six degrees, twenty three minutes east (S-26 deg. 23′ E) along the said right of way line a distance of two hun-

dred and no one hundredths (200.00) feet to a point, said point being in the north line of forty ninth (49th) street, thence (5) south sixty three degrees, thirty seven minutes west (S-63 deg. 37′ W) along the said north line of forty ninth (49th) street a distance of fifty and no hundredths (50.00) feet to a point, said point being the south east corner of lot twenty seven (27) block five hundred and thirteen (513) as shown on map of Newport News, Va., sheet 1 of r sheets, scale one (1) inch equals two hundred (200) feet, and dated August 24, 1921, thence (6) north twenty six degrees twenty three minutes west (N-26 deg. 23′ W)along the east line of said lot twenty seven (27) a distance of one hundred and no one hundredths (100.00) feet to a point, said point being the northeast corner of said lot twenty seven (27) thence (7) south sixty three degrees thirty seven minutes west (S-63 deg. 37′ W) along the north line of said lot twenty seven (27) and lots twenty eight (28), twenty nine (29), thirty (30) thirty one (31) and thirty two (32) of said block five hundred and thirteen (513) a distance of one hundred and fifty and fifty one hundredths (150.50) feet to a point, said point being the north west corner of said lot thirty two (32) thence (8) (62) north twenty six degrees, twenty three minutes west (N- 26 deg. 23′ W) along the east line of lots thirty seven (37), thirty eight (38), thirty nine (39) and forty (40) of said block five hundred and thirteen (513) and crossing fiftieth (50th) street, a distance of one hundred and sixty and no hundredths (160.0) feet to a point, said point being in the north line of fiftieth (50) street, thence (9) south sixty three degrees thirty seven minutes west (S-63 deg. 37′ W) along the said north line of fiftieth (50) street a distance of one hundred and no hundredths (100.00) feet to a point, said point being the intersection of the said north line of fiftieth (50th) street and the east line of Virginia Avenue, thence (10) north twenty six degrees, twenty three minutes west (N-26 deg. 23′ W) along the said east line of Virginia Avenue a distance of two thousand and eighty and thirty one hundredths (2080.31) feet to a point of beginning, containing seventeen and sixty four one hundredths (17.64) acres more or less, all as shown on map No. 6163-324, entitled "Property Map of Warehouse Sites, Newport News, Virginia," dated July 25, 1922, filed in the office of the Quarter-

master General, Washington, D. C., a copy of which is attached hereto and made a part of this description.

$63,504.

TRACT NO. 2.

All that certain tract or parcel of land situated in the City of Newport News, Virginia and more particularly bounded and described as follows:

Beginning at a point, said point being in the center line of a thirty (30) foot county road leading from Newport News, Virginia, to Hilton, Va., and being also on the line between Warwick County and the City of Newport News, Va., and one hundred (100) feet north of the north line of sixty four (64th) street as laid out by the City of Newport News, Va., and running thence (1) North twenty six degrees twenty three minutes West (N 26 deg. 23′ W) along the said center line of said county road a distance of one thousand eight hundred fifty six and forty eight one hundredths (1856.48) feet to a point, said point being in the south line of the Washington McLean tract, thence (2) north forty six degrees and no minutes East (N 46 deg. 0′ E) along the said south line of said Washington McLean Tract a distance of four hundred and seven and ninety four hundredths (407.94) feet to a point in the westerly right of way of the Chesapeake and Ohio Railway Company, thence (3) south twenty six degrees, twenty three minutes East (S 26 deg. 23′ E) along said right of way line a distance of two thousand seven hundred sixty nine and eighty eight hundredths (2769.88) feet to a point, said point being in the north line of the Newport News Light and Power Company's Land; thence (4) south sixty three degrees, thirty seven minutes West (S 63 deg. 37′ W) along the north line just mentioned a distance of three hundred and forty nine and seventy hundredths (349.70) feet to a point, said point being in the east line of Virginia Avenue; thence (5) North twenty six degrees, twenty three minutes West (N 26 deg. 23′ W.) along said east line of Virginia Avenue a distance of seven hundred and ninety (790) feet to a point, said point being in said

line between Warwick County, and the City of Newport News, Va.; thence (6) south sixty three degrees, thirty seven minutes West (S 63 deg. 37′ W.) along line just mentioned a distance of forty and no hundredths (40.00) feet to the point of beginning, containing twenty three and forty seven hundredths (23.47) acres more or less, all as shown on map No. 6136-324, entitled "Property Map of Warehouse Sites, Newport News, Va.", dated July 25, 1922, filed in the office of the Quartermaster General, Washington, D. C., a copy of which is attached here to and made a part of this description.

$61,022.

TRACT NO. 4.

All that certain tract or parcel of land in the County of Warwick, Virginia, more particularly bounded and (63) described as follows:

Beginning at a point, said point being in the center line of a thirty (30) foot county road leading from Newport News, Va., to Hilton, Va., and being also in the north line of the Washington McLean tract and running thence (1) North twenty six degrees, twenty three minutes West (N 26 deg. 23′ W) along the said center line of said county road a distance of two hundred and eighty and fifty two hundred (280.52) feet to a point, thence (2) North sixty three degrees, thirty seven minutes East (N 63 deg. 37′ E) a distance of three hundred and eighty eight and sixty one hundredths (388.61) feet to a point, said point being in the westerly right of way line of the Chesapeake and Ohio Railway Company; thence (3) south twenty six degrees, twenty three minutes East (S 26 deg. 23′ E) along said right of way line a distance of one hundred and sixty five and twenty nine hundredths (165.29) feet to a point, said point, being in the aforementioned north line of the Washington McLean tract; thence (4) south forty seven degrees, six minutes West S. 47 deg. 06′ W) along the north line just mentioned a distance of four hundred and five and fifty five hundredths (405.55) feet to the point of beginning, containing one and ninety nine hundredths (1.99) acres,

more or less, all as shown on Map No. 6139-324, entitled "Property Map of Warehouse Sites, Newport News, Va.", dated July 25, 1922, filed in the Office of the Quartermaster General, Washington, D. C., a copy of which is attached hereto and made a part of this description.

$5,174.

The grand total for the said three tracts or parcels of land above mentioned and described, being the aggregate value of all the defendant's lands herein enumerated and covered by the proceedings in this cause, is

$129,700

Together with interest thereon at 6% per annum from July 1st, 1922, until paid:

The above awards include any and all damages to adjacent or other property and to any and all parties except the right of way of the N. N. L. & Water Co. owning or claiming any right, title, estate or interest in the adjacent land or other property and to any and all parties owning or claiming to own any right, title, estate or interest in or to the proceeds arising out of the taking of said lands.

F. M. KILLAM,
Foreman."

And the jury was thereupon discharged from further duty in the case and the Defendant by counsel moved (64) the Court to set aside the verdict of the Jury on the ground that the same is contrary to the law and the evidence and for misdirection of the Jury, which motion was continued.

D. LAWRENCE GRONER,
U. S. Judge.

ORDER CONFIRMING AND APPROVING VERDICT

(65) Entered & Filed May 21st, 1923.

This day came as well the Petitioners, by their attorneys, as the Defendant, by its attorneys, and the Court having maturely considered the motion of the Defendant to set aside the verdict of the Jury rendered herein on April 26, 1923, and award it a new trial, doth overrule the same;

And it is accordingly adjudged, ordered and decreed that the verdict of the jury rendered herein on April 26, 1923, be and the same hereby is fully confirmed and approved in all respects:

And it is further adjudged, ordered and decreed that the United States of America, through its proper officers, do deposit within Sixty days from May 21st, 1923, in the registry of this Court to the credit of the Couer in these proceedings, the amounts of the awards of the Jury for the respective tracts of land of the Defendant in these proceedings as follows:

TRACT NO. 1, containing 17.64 acres, more or less, and in the Verdict of the Jury mentioned and fully described ----------	$63,504.00
TRACT NO. 2, containing 23.47 acres, more or less and in the verdict of the Jury mentioned and fully described ----------	61,022.00
TRACT NO. 4, containing 1.99 acres, more or less, and in the verdict of the Jury mentioned and fully described ----------	5,174.00

together with interest at the rate of six per cent per annum on the said amounts respectively from the 1st day of July, 1922, until the said amounts respectively are (66) so deposited in the registry of this Court to the credit of the Court in these proceedings;

And upon the payment of the amounts of the awards for any of the said respective tracts of land, an order will be entered herein confirming the title in the United States of America to the said tract or tracts of land for which the amounts herein specified have been so paid into the registry of this Court, subject to the rights of the Newport News Light and Water Company in and to its right of way.

To which action of the Court in overruling the motion of the Defendant to set aside the verdict of the Jury and award a new trial, and in confirming and approving the verdict of the Jury the Defendant, by counsel, duly excepted; and the Defendant having indicated its intention to sue out a writ of error from this judgment of the Court leave is hereby given the Defendant to file within Sixty days its Bills of Exception.

D. LAWRENCE GRONER,
United States Judge.

ORDER FILING BILLS OF EXCEPTIONS

(67) Entered July 11th, 1923.

On this 11th day of July, 1923, came the defendant, by its counsel, and tendered this its six bills of exceptions, numbered from 1 to 6, inclusive, by leave of the Court previously given, and on its motion said six bills of exceptions, duly signed and sealed, are ordered to be filed in this cause, and the same is accordingly done.

D. LAWRENCE GRONER, (Seal)
U. S. Judge.

DEFENDANT'S BILL OF EXCEPTION NO. 1

(68) Filed July 11, 1923.

BE IT REMEMBERED that on the trial of this cause the defendant, by its attorneys, moved to strike out and reject the letter of the Honorable John W. Weeks, Secretary of War, to the Honorable the Attorney General, Washington, D. C., under date of July 21, 1922, filed with

the amended petition in this cause, and to dismiss the said amended petition for the following reasons:

1. The amended petition does not allege that the Secretary of War, or any other officer of the United States Government, has been authorized to acquire the lands and property mentioned in said petition for public use.

2. There is no allegation of the particular public use for which the said lands are acquired, so as to enable the Court to determine whether or not the use in question is a public use, and whether or not the same has been authorized by law.

3. The amended petition fails to allege that the object of these proceedings is to complete the acquisition of real estate in respect whereof requisition notices had been served or given before July 11, 1919, or in respect whereof agreements had been made for the purchase thereof, or proceedings begun for the condemnation thereof, as required by the Acts of March 8, 1922, and July 1, 1922, respectively.

4. The letter of the Secretary of War above referred to shows on its face that the lands sought to be con-
(69) demned in this case are not sought or needed by the United States for the public use, but simply for the public benefit, to protect the Government's interests in certain expenditures made, or improvements placed on said lands.

5. The Act of March 8th, 1922, relied on in the petition, is in violation of the Constitution of the United States, and especially the Fifth Amendment thereto, in that it deprives the owners of the property sought to be condemned of said property without due process of law, and takes private property for public use without just compensation, in this, to-wit, the said Act provides:

(a) That in event of a judicial or administrative award approved by the Secretary of War "any addition to the value of the premises resulting from the improvements thereto, or in the vicinity thereof made, by, or at

the expense of the United States, shall be excluded from the sum paid to or recovered by the owners", and

(b) In event the Secretary of War causes a condemnation proceeding to be instituted for the acquisition of the title "any addition to the value of the premises resulting from improvements thereto, or in the vicinity thereof, made by, or at the expense of the *the* United States, shall not be included in the award to the owners."

But the Court overruled said motion and declined to strike out and reject said letter, or to dismiss the said amended petition, to which ruling of the Court the defendant, by counsel, excepted, and prays that this, its Bill of Exception No. 1, may be signed, sealed and made a part of the record, which is accordingly done this 11th day of July, 1923, within the time prescribed by law.

D. LAWRENCE GRONER,
U. S. District Judge.

DEFENDANT'S BILL OF EXCEPTION NO. 2.

(70) Filed July 11th, 1923.

BE IT REMEMBERED that upon the trial of this cause the petitioners, by counsel, tendered in evidence a certain letter written by the Honorable John W. Weeks, Secretary of War, to the Honorable the Attorney General, Washington, D. C., under date of July 21, 1922, filed with the amended petition in this cause, which letter is in the following words and figures:

K- RE- 601.1-

Newport News, Va.

(Quartermaster Whses.) July 21, 1922.

The Honorable,
The Attorney General.

My dear Mr. Attorney General:

During the war the Government selected certain land

at Newport News, Virginia, as a site for Quartermaster Warehouses.

Improvements aggregating $1,995,000.00 were placed on the site. Since that time some of the land forming a part of the warehouse site has been relinquished and the improvements thereon salvaged. There still remain on the land, now in the possession by the Government, improvements representing a cost of $1,522,000.00.

To protect the Government's interests it is necessary and highly advantageous to acquire title to the lands upon which these improvements are situated.

In 1919 an effort was made to acquire title to these lands by direct purchase but was as the price demanded by the owners was excessive and unreasonable condemnation proceedings were recommended and approved by the Secretary of War.

Further action toward the procurement of title under the authority of the Secretary of War from the funds then available was stopped by the provisions of the Act of July 1, 1919. An appropriation has since been made by the Congress which is now available for the acquisition of these lands. The appropriation is contained in H. R. 12090, entitled "An Act making appro-
(71) priations to supply deficiencies in appropriations for the fiscal year ending June 30, 1922, and prior fiscal years, supplemental appropriations for the fiscal year ending June 30, 1923, and for other purposes". Authority for the acquisition of these lands is contained in the Act just cited and the Act Approved March 8th, 1922, entitled "An Act to amend the Army Appropriation Act, approved July 11, 1919".

These lands have been under lease ever since their selection as a site for the Quartermaster Warehouses. Effort was made to renew the leases but the lessors refused to renew, so that all the leases expired on June 30, 1922. These leases provided that all Government improvements must be removed within thirty days after the expiration thereof.

The following data is transmitted herewith for your information and use:

(a) Detailed report of the status of acquisition of the lands sought to be acquired, made by W. F.

Turton of the Real Estate Service, Office of the Quartermaster General, marked "Exhibit A".

(b) Photostat of each of the leases and the renewals thereof, together with notices to renew, and a photostat of Map showing the land leased, marked "Exhibit "B".

(c) Photostat of the renewal of the Secretary of War, dated July 7, 1919, authorizing the original institution on condemnation proceedings to acquire the land by virtue of the Act of July 2, 1917, as amended April 8, 1918, together with photostat copies of certain correspondence relative to the acquisition, marked "Exhibit C".

The property sought to be acquired is that of the Old Dominion Land Company, and the Washington McLean Estate. An accurate survey of the particular land to be acquired is now being made and as soon as completed a legal description thereof will be forwarded to you.

In view of the fact that this is a matter requiring immediate action, you are requested to institute condemnation proceedings before July 30, 1922, to acquire the fee simple title to the land in question, the approximate area of which is outlined in red on the photostat map transmitted herewith, and to take such other steps as are necessary to protect the Government's interests.

Sincerely yours,

JOHN W. WEEKS,
Secretary of War.

Delivered in Person (F. B. H.)
7-21-22.

3 1 ncls.

(Exhibit A- Report).
(Exhibit B- Photostats of leases, renewals and map.)
(Exhibit C- Photostats of correspondence).

To the introduction of which letter the defendant, by
(72) its counsel, objected on the ground that there was

a variance between the contents of said letter and the allegations of the petition; but the Court overruled said objection and admitted said letter in evidence, to which ruling of the Court the defendant, by its counsel, excepted, and prays that this, its Bill of Exception No. 2, may be signed, sealed and made a part of the record, which is accordingly done this 11th day of July, 1923.

D. LAWRENCE GRONER. (Seal)
U. S. Judge.

BILL OF EXCEPTIONS NO. 3.

(73) Filed July 11th, 1923.

BE IT REMEMBERED that on the trial of this cause, the petitioners proved that the War Department had leased the land sought to be condemned in these proceeding from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom, within thirty days after the expiration of the lease, the improvements placed thereon by the lessee during the term of said lease; that during the term of said lease certain warehouses were placed thereon by the petitioners; and that these had not been removed from the premises within the period prescribed by the lease. The defendant proved that the land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, unless the letter of Secretary of War Baker filed with petition as amended constitutes the beginning of such proceedings; nor any judicial or administrative award made with respect thereto at any time; that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department, acting for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had been referred by Congress for consideration and report, which bill was sub-

sequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act", etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment in the buildings on said property and that the amounts (74) asked for was for the purpose of completing obligations incurred by the War Department during the process of acquiring the real estate upon which the buildings were located, and made such other statements and representatives as caused the House Committee on Military Affairs to Report to the House of Representatives as per copy of report hereto attached Marked Exhibit "A", (Mr. McKenzie's Report No. 183), and which caused a report to be made to the Senate by the Senate Committee of Military Affairs, as per copy of report hereto attached marked "Exhibit "B" (Mr. Wadsworth Report No. 215);

And defendant further proved prior to the institution of these proceedings that the War Department had been engaged in negotiations for the sale of the warehouses on the said land to various parties; and that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of the said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, Mayor of Newport News, Va., that the said warehouses were surplus property and were not needed by the Government; and on the 18th day of July, 1922, caused to be executed by the Assistant Secretary of War a contract for the lease of the same to Edward W. Wolcott, a citizen of the City of Norfolk, Va., who was in no wise connected with the United States Government, which lease is in the following words and figures:

"REVOCABLE RELEASE".

"THIS LEASE made between the Secretary of War, of the first part, and EDWARD W. WOLCOTT, Attorney, of Norfolk, Virginia, of the second part, WITNESSETH: That the Secretary of War by virtue of the authority conferred on him by an Act of Congress

approved July 28, 1892, (27 Stat. 321), entitled an Act Authorizing the Secretary of War to lease public property in certain cases", and in consideration of the monthly rental of $1500.00 payable in advance on or before the fifth day of each month, the first payment to be made (75) at the time of delivery of this lease to the lessee, hereby leases to the party of the second part, hereinafter designated as the lessee, for six months, commencing August 1, 1922, but revocable at will by the Secretary of War, the following described premises and property located at Newport News, Virginia:

All that land and buildings known and described as twenty-one warehouses, comprising groups 2 and 3, with the exception of the two now temporarily used by the Newport News Shipbuilding and Dry Dock Company, together with such machinery and equipment as is incident thereto, and the use of the railroad tracks necessary for the proper use of the warehouses under this lease.

"It is provided that the above mentioned land, buildings, machinery, equipment and railroad tracks shall be kept in good condition, order and repair, ordinary wear and tear excepted, and returned to the lessor at the expiration or revocation of this lease. It is understood by the lessee that the United States Government does not have title to the land on which the within warehouses stand, and that this lease is granted subject to such action as the owners of the real estate might legally take. It is further understood that this lease is to be operative and binding to the lessee only in the event that it is possible to have the same bonded by the United States Government, so as to make them bonded warehouses.

And the lessee hereby covenants to pay to the United States the monthly rental above reserved on the dates above mentioned: that this lease shall be revocable at will by the Secretary of War; and to pay to the United States on demand any sum which may have to be expended after the expiration or revocation of this lease in putting the said premises or property in as good condition for use by the United States as it is at the date of the execution of this lease.

And it is still further agreed that after the expiration or revocation of this lease the lessee shall remove any construction or other property which it may have on said premises, within such time as the Secretary of War may indicate; and upon its refusal, neglect, or inability (76) to remove the same, the Secretary of War may cause them to be removed at the expense of the lessee and no claim for damages against the United States, or any agent thereof, shall be credited by or made on account of such removal.

WITNESS my hand and seal of the War Department this 18th day of July, 1922.

(Signed) J. M. WAINWRIGHT,
The Assistant Secretary of War.

(Seal)

THIS LEASE is also executed by the Lessee this.... day of ....., 1922.

.....
Attorney.

Signed and sealed in the presence of
.....
....."

The said lease was never actually executed by the said E. W. Wolcott.

And the Petitioners proved that the Judge Advocate General of the War Department advised the Secretary of War that such contract was not legal at that time;

WHEREUPON the defendant by counsel upon the facts so proven requested the Court to dismiss these proceedings;

But the petitioners, by their counsel, objected to the consideration of the facts proved by the defendant, which motion the Court sustained upon the ground that the Acts of Congress dated March 8, 1922, and July 1, 1922, respectively, were conclusive upon the Court, as (77) set out in its opinion.

To which action of the Court the defendant, by its counsel excepted, and tenders this its bill of exceptions number 3, which it prays may be signed, sealed and made a part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER, (Seal)
U. S. Judge.

EXHIBIT "A".

HOUSE OF REPRESENTATIVES

67th Congress,
1st Session.

Report
No. 183.

AMENDMENT OF ARMY APPROPRIATION ACT
(78) APPROVED JULY 11, 1919.

June 16, 1921.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. McKenzie, from the Committee on Military Affairs, submitted the following

REPORT.

[To accompany H. R. 7158.]

The Committee on Military Affairs, to whom was referred the bill (H. R. 7158) to amend the Army appropriation act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases, and making additional appropriations therefor, having considered the same, report thereon with a recommendation that it do pass.

The members of the committee, realizing the importance of this bill and being desirous of giving the House such information as will enable the Members of Congress to understand fully the purposes of the same, have undertaken to set forth in some detail the laws under which

the obligations were incurred by the Government, together with a brief statement covering the location, extent, value, and use of the several tracts involved, as follows:

During the war it became necessary to acquire various tracts of land for use by the military forces of the country in the pursuit of its operations. Under the laws then existing it was difficult and almost impossible to gain immediate possession of the property required. Thus, after having been presented to Congress, emergency legislation was enacted which authorized the President to take over forthwith such properties as were deemed essential to the prosecution of the war. This law, known as the food and fuel act, was enacted August 10, 1917, and reads, in part, as follows:

[Act of Congress approved August 10, 1917 (40 Stat., 276, 279), being an act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.]

SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies: *Provided*, That nothing in this section or in the section that follows shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person,

firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Under this authority many of the activities under control of the War Department were requisitioned in order that immediate possession might be taken of the property, and the matter of examining title and completing payment was delayed until a future time. At that time Congress had made sufficient appropriation to cover all of the projects necessary in the prosecution of the war with the Central Powers. Such appropriations as had been made were available for the completion of all projects begun and the payment of awards made by those agencies of the War Department constituted for the purpose of hearing disputes as to land values, etc., until the enactment of the Army appropriation bill for 1920, which was approved July 11, 1919, and which carried an amendment reading as follows:

* * * (Restrictions in the use of appropriations.) That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the M ary Establishment shall be expended for the purchase of real estate for the construction of Army camps or cantonments, except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necessary in order to protect the interests of the Government.

The above provision therefore prohibited the completion of any contracts for the purchase of real estate, or payment of any awards which may have been made in the acquisition thereof.

H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above-mentioned restrictive act, and in each case it is apparent the United States is definitely obligated under the terms of a written contract

or an award made by a duly authorized agent of the department. These projects are as follows:

FOR THE ARMY SUPPLY BASE, NEW ORLEANS, LA., $282,000.

Location: New Orleans, La.
Acreage: 39.97.
When acquired: 10.72 acres acquired August 9, 1918; 29.25 acres yet to be acquired; total 39.97 acres.
Improvements: Wharf with 2-story structural steel warehouse, 2,000 feet long by 140 feet wide, back of which are three 6-story reinforced concrete warehouses together with adequate railroad classification and storage yards.
Storage space: 2,072,000 square feet gross, 1,685,000 square feet net.
Investment: Land, $51,800 (acquired), $282,000 (under contract). Improvements, $12,500,000. Total investment, $12,833,800.

FOR THE ARMY SUPPLY BASE, BROOKLYN, N. Y., $1,590,675.52.

Location: Brooklyn, N. Y.
Acreage: 99.97.
When acquired: All acquired by requisition in April and May, 1918. Payment in amount of $2,334,972.38 has been made in full for 42.93 acres. Part payment in amount of $1,427,860.87 has been made on 57.04 acres.
Improvements: Two 8-story warehouses (concrete), three 2-story wharf sheds with four piers all of concrete, and adequate railroad storage and classification yards.
Storage space: 4,681,220 square feet gross, 3,800,224 square feet net.
Investment: Land, $3,762,833.25 (paid), $1,590,675.52 (amount estimated for completion); total $5,353,508.77. Improvements, $26,000,000. Total investment, $31,353,508.77.

FOR THE ARMY SUPPLY BASE, PHILADELPHIA, PA., $766,937.

Location: Philadelphia, Pa.
Acreage: 119.9339.
When acquired: None yet acquired; 30.9737 acres requisitioned in July, 1918, and no payments made there-

on; 88.9602 acres contracted for in June, 1919; total, 119.9339 acres.

Improvements: Three concrete piers and three story reinforced concrete and brick pier shed.

Storage space, 893,250 square feet covered, 587.600 square feet open.

Investment: Land, nothing yet paid; $766,937 estimated as necessary to acquire land. Improvements, $13,000,000. Total investment, $13,766,937.

FOR THE ARMY SUPPLY BASE, CHARLESTON, S. C., $159,020.

Location: Charleston, S. C.

Acreage: 1,533.6.

When acquired: Requisitioned in April, 1918. No payments on requisition have been made.

Improvements: Six warehouses with tile walls and wood floors, 2 pierhead houses of same construction, 2 open storage areas, and 56 ordnance powder magazines with 1 ordnance pierhead.

Storage space: 1,800,000 square feet gross, 1,600,000 square feet net.

Investment: Land, nothing yet paid; $159,020 estimated as necessary to make payment. Improvements, $16,500,000. Total investment, $16,659,020.

FOR THE ARMY SUPPLY BASE, NORFOLK, VA., $190,000.

Location: Norfolk, Va.

Acreage: 913.4.

When acquired: 782.83 acres acquired in March, 1918; 35 acres (approximately) acquired in May and June, 1919; 95.97 acres not yet acquired; total, 913.4 acres.

Improvements: Two reinforced-concrete piers with one and two story pier sheds, respectively, eight 1-story warehouses, railroad storage and classification yards having a total of 43.9 miles of track, together with water mains, reservoir, sewer and electrical system, and appurtenances thereto.

Storage space: 2,765,300 square feet gross, 2,451,305 square feet net.

Investment: Land, $2,293,174.91 (acquired), $190,000 (estimated as necessary to complete acquisition). Improvements, $26,675.00; total investment, $29,158,174.91.

FOR THE INTERIOR QUARTERMASTER STORAGE DEPOT, NEW CUMBERLAND, PA., $92,500.

Location: New Cumberland, York County, Pa.
Acreage: 941.5.
When acquired: 403 acres May, 1918; 538.5 acres requisitioned May, 1918. Not yet paid for.
Improvements: Eight fireproof warehouses, two open sheds, railroad and classification yard, barracks and quarters, water-supply mains.
Storage space: 1,946,000 square feet.
Investment: Land, $92,500; improvements, $4,385,000; total, $4,477,500.

FOR THE INTERIOR QUARTERMASTER STORAGE DEPOT, SCHENECTADY, N. Y., $3,000.

Location: Schenectady, N. Y.
Acreage: 231.36.
When acquired: May, 1918, 220 acres; 93 lots yet to be acquired.
Improvements: 8 closed warehouses, 2 open sheds, 42 small cantonment buildings.
Storage space: Amount closed, 2,060,000 square feet; amount open, 537,600 square feet.
Investment: Land, $88,646; improvements, $4,680,000; total, $4,768,646.

FOR THE QUARTERMASTER DEPOT, JEFFERSONVILLE, IND., $225,000.

Location: Jeffersonville, Ind.
Acreage: 261.6.
When acquired: 17.4 acres acquired in 1870; 8.58 acres acquired; 235.62 not yet acquired; total, 261.6 acres.
Improvements—various warehouses of the following classes of construction: Steel frame covered with sheet iron; wood frame covered with sheet iron; brick and concrete; frame together with the necessary railroad spur tracks.
Storage space: 3,852,165 square feet.
Investment: Land, $2,294 (for 8.58 acres acquired since April 6, 1917. Cost of 17.4 acres acquired in 1870 not available); $225,000 estimated as necessary to com-

plete acquisition; $227,000; improvements, $2,732,000; total investment, $2,959,294.

FOR THE QUARTERMASTER WAREHOUSE, BALTIMORE, MD., $100,000.

Location: Baltimore, Md.
Acreage: 35.37.
When acquired: None yet completed. Entire area requisitioned in July, 1918.
Improvements: Four good warehouses with brick fire walls, together with railroad facilities, wood garage, and several small frame office buildings.
Storage space: 665,600 square feet net.
Investment: Land, nothing yet paid; $100,000 estimated as necessary to make payment. Improvements, $1,909,000; total investment, $2,009,000.

FOR THE QUARTERMASTER WAREHOUSES, NEWPORT NEWS, VA., $223,670.

Location: Newport News, Va.
Acreage: 41.35.
When acquired: Occupied by lease in 1917 or early part of 1918, at rental of $3,588.48 per annum.
Improvements: Group of semipermanent warehouses (concrete floors, frame superstructure, and brick fire walls), with railroad trackage, concrete roadways, water supply, etc.
Storage space: 420,000 square feet under cover.
Investment: Land, nothing yet paid; $223,670 estimated as necessary to acquire. Improvements, $1,995,000; total investment, $2,218,670.

FOR ARTILLERY RANGE, TOBYHANNA, PA., $7,533.67.

Location: Tobyhanna, Pa.
Acreage. 21.125 acres.
When acquired: 18.942 acres acquired during period from January, 1914, to July, 1918; 2,183 acres not yet acquired.
Improvements: Not available.
Storage space: Not a storage project.
Investment: Land, $56,000 approximate cost of land

acquired; $7,533.67 cost of land to be acquired; total, $63,-533.67; improvements, not available.

FOR GENERAL HOSPITAL NO. 19, AZALEA, N. C., $58,000.

Location: Azalea, N. C.
Acreage: 375.63.
When acquired: 289.24 acres requisitioned in March and June, 1919, 86.39 acres under contract dated June, 25, 1919.
Improvements: Building comprising General Hospital No. 19, with capacity for 1,300 beds.
Storage space: None.
Investment: Land, nothing yet paid; $58 000 estimated as necessary to acquire land; improvements, $2,-668,609; total investment, $2,726,609.

FOR SOUTHER FIELD SEPTIC TANK SITE, AMERICUS, GA., $750.

Location: Americus, Ga.
Acreage 4.6 acres.
NOTE.—Souther Field proper consists of 406.68 acres which was acquired July 5, 1919, at a cost of $32,534.40.
When acquired: Septic tank site not yet acquired (under condemnation).
Improvements: Septic tank for Souther Field.
Storage space: None.
Investment: Land, nothing yet paid; $750 estimated as necessary to make payment; improvements, $30,000 (cost of improvements for Souther Field proper not available); total investment, $30,750.

FOR SAVANNA PROVING GROUND, SAVANNA, ILL., $500.

Location: Savanna, Ill.
Acreage: 13,172 acres acquired July, 1917-May, 1918; 0.387 acre to be acquired, site and access of observation tower; part of proving facilities, 13,172.387 acres.
Improvements: Proving ground improvements complete, involving telephone system, firing points, observation towers, assembly sheds, bombproofs, machine shops, assembly and storage buildings, all permanent; housing for 11 officers, 4 noncommissioned officers, and 300 men, all permanent.

Storage space: 49 ammunication magazines, 497,084 square feet; 1 nitrate pit, 382,356 square feet general storage (inert), 1,536,000 square feet in 40 units; 30 high-explosive magazines, 42,570 square feet in 120 units.

Investment: Land, $900,000; improvements, $4,986,503, estimated.

FOR DELAWARE ORDNANCE RESERVE DEPOT, PEDRICKTOWN, N. J., $215,652.90.

Location: Pedricktown, Salem County, N. J.

Acreage: 1,540.14 acres.

When acquired: Requisitioned October, 1918, but not paid for.

Improvements: Description—Permanent storage establishment, storage buildings, docks, locomotive house, utilities buildings, permanent construction, housing, temporary construction.

Storage: 32 ammunition magazines, 346,080 square feet; 53 smokeless powder magazines, 150,573 square feet; 8 primer and fuse magazines, 22,728 square feet. 8 general warehouses, temporary type, 17,063 square feet; total 536,444 square feet.

Investment: Land, none; improvements, $3,487,273, approximately.

FOR SEWER RIGHT OF WAY FOR HOUSING PROJECT, BETHLEHEM, PA., $275.

Location: Bethlehem, Pa.

Acreage: Right of way for sewer.

When acquired: May, 1918.

Improvements: Sewer. This is claim for damage for sewer right of way in connection with housing facilities on ordnance contract with the Bethlehem Steel Co. The contract has been closed and the housing facilities disposed of. The award in condemnation for damages sustained, however, remains.

FOR THE MIDDLETOWN ORDNANCE RESERVE DEPOT, MIDDLETOWN, PA., $50,000.

Location: Middletown, Mifflin County, Pa.

Acreage: 89.99.

When acquired: Requisitioned August, 1918, but not paid for.

Improvements: Two permanent warehouses, temporary housing facilities.

Storage space: 320,640 square feet.

Investment: Land, none; improvements, $1,398,700, approximately.

FOR THE ABERDEEN PROVING GROUND, MARYLAND, $174,591.63.

Location: Baltimore and Harford Counties, Md.

Acreage, 35,000.

When acquired: Beginning, October, 1917; acquisition not yet completed; approximately 100 acres not as yet paid for.

Improvements: Barracks, officers' quarters, administration buildings, offices, warehouses, proving grounds, bombing fields, etc.

Storage space: Unknown.

Investment: $7,000,000 appropriated by act approved October 6, 1917. Appropriation increased to $8,480,000 by act approved July 8, 1918. From foregoing appropriation $3,563,503.20 has been allotted for procurement of land and payment of damages in connection therewith. Of this allotment, $74,591.63 remains unexpended. In addition to this unexpended balance it would require approximately $100,000 to complete purchase of land and pay land-damage claims. It is understood that practically all of the balance of the appropriation has been expended for buildings and improvements.

The total amount authorized to be appropriated in this bill is $4,140,105.72, which is for the completion of the purchase of the real estate upon which the United States has erected improvements, the value of which is $131,589,131. It is therefore apparent that it is decidedly to the interest of the United States to complete these projects in order to protect the large investment involved.

In conclusion, we feel it proper to state that the purpose of this legislation is to enable the War Department to perfect the title to the various tracts of real estate

mentioned in the bill, and upon practically all of which extensive improvements have been made.

Whether the original acquisition of all of this real estate was wise or in the interest of the Government is no longer a debatable question. Under the laws enacted by Congress the power to acquire was exercised and the possession taken from the owners by the agents of the Government who have up to this time been waiting for the settlement of their claims, but being denied on the ground that the limitation placed by Congress in the Army appropriation act approved July 11, 1919, prevents payment.

It may be that all of these tracts of land will not be necessary for the Military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saying anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government.

(80)

EXHIBIT "B".

CALENDAR NO. 227.

67th Congress, 1st Session. SENATE Report No. 215.

AMENDMENT OF ARMY APPROPRIATION ACT APPROVED JULY 11, 1919.

July 8, 1921.—Ordered to be printed.

Mr. Wadsworth, from the Committee on Military Affairs, submitted the following

REPORT.

[To accompany H. R. 7158.]

The Committee on Military Affairs, to whom was referred the bill (H. R. 7158) to amend the Army appropriation act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases and making additional appropriations therefor, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

On page 2, line 10, after the word "hereby," strike out the rest of the sentence and "priated" on line 11 and insert in lieu thereof the following: "appropriated out of any money in the Treasury not otherwise appropriated"

In reporting this measure to the House the House Military Affairs Committee made the following statement:

[House Report No. 183, Sixty-seventh Congress, first session.]

The members of the committee, realizing the importance of this bill and being desirous of giving the House such information as will enable the Members of Congress to understand fully the purposes of the same, have undertaken to set forth in some detail the laws under which the obligations were incurred by the Government, together with a brief statement covering the location, extent, value, and use of the several tracts involved, as follows:

During the war it became necessary to acquire various tracts of land for use by the military forces of the country in the pursuit of its operations. Under the laws then existing it was difficult and almost impossible to gain immediate possession of the property required. Thus, after having been presented to Congress, emergency legislation was enacted which authorized the President to take over forthwith such properties as were deemed essential to the prosecution of the war. This law, known as the food and fuel act, was enacted August 10, 1917, and reads, in part, as follows:

[Act of Congress approved August 10, 1917 (40 Stats., 276, 279), being an act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.]

SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies: *Provided*, That nothing in this section or in the section that follows shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Under this authority many of the activities under control of the War Department were requisitioned in order that immediate possession might be taken of the property, and the matter of examining title and completing payment was delayed until a future time. At that time Congress had made sufficient appropriation to cover all of the projects necessary in the prosecution of the war with the Central Powers. Such appropriations as had been made were available for the completion of all projects begun and the payment of awards made by those agencies of the War Department constituted for the purpose of hearing disputes as to land values, etc., until the enactment of the Army appropriation bill for 1920, which was approved July 11, 1919, and which carried an amendment reading as follows:

* * * (Restrictions in the use of appropriations.) That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the

Army or the Military Establishment shall be expended for the purchase of real estate for the construction of Army camps or cantonments, except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necessary in order to protect the interests of the Government.

The above provision therefore prohibited the completion of any contracts for the purchase of real estate or payment of any awards which may have been made in the acquisition thereof.

H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above-mentioned restrictive act, and in each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the department. These projects are as follows:

FOR THE ARMY SUPPLY BASE, NEW ORLEANS, LA., $282,000.

Location: New Orleans, La.

Acreage: 39.97.

When acquired: 10.72 acres acquired August 9, 1918; 29.25 acres yet to be acquired; total 39.97 acres.

Improvements: Wharf with 2-story structural steel warehouse, 2,000 feet long by 140 feet wide, back of which are three 6-story reinforced concrete warehouses together with adequate railroad classification and storage yards.

Storage space: 2,072,000 square feet gross, 1,685,000 square feet net.

Investment: Land, $51,800 (acquired), $282,000 (under contract). Improvements, $12,500,000. Total investment, $12,833,800.

FOR THE ARMY SUPPLY BASE, BROOKLYN, N. Y., $1,590,675.52.

Location: Brooklyn, N. Y.

Acreage: 99.97.

When acquired: All acquired by requisition in April and May, 1918. Payment in amount of $2,334,972.38 has been made in full for 42.93 acres. Part payment in amount of $1,427,860.87 has been made on 57.04 acres.

Improvements: Two 8-story warehouses (concrete), three 2-story wharf sheds with four piers all of concrete, and adequate railroad storage and classification yards.

Storage space: 4,681,220 square feet gross, 3,800,224 square feet net.

Investment: Land, $3,762,833.25 (paid), $1,590,675.52 (amount estimated for completion); total $5,353,508.77. Improvements, $26,000,000. Total investment, $31,353,508.77.

FOR THE ARMY SUPPLY BASE, PHILADELPHIA, PA., $766,937.

Location: Philadelphia, Pa.

Acreage: 119.9339.

When acquired: None yet acquired; 30.9737 acres requisitioned in July, 1919, and no payments made thereon; 88.9602 acres contracted for in June, 1919; total, 119.9339 acres.

Improvements: Three concrete piers and three story reinforced concrete and brick pier shed.

Storage space, 893,250 square feet covered, 587.600 square feet open.

Investment: Land, nothing yet paid; $766,937 estimated as necessary to acquire land. Improvements, $13,000,000. Total investment, $13,766,937.

FOR THE ARMY SUPPLY BASE, CHARLESTON, S. C., $159,020.

Location: Charleston, S. C.

Acreage: 1,533.6.

When acquired: Requisitioned in April, 1918. No payments on requisition have been made.

Improvements: Six warehouses with tile walls and wood floors, 2 pierhead houses of same construction, 2 open storage areas, and 56 ordnance powder magazines with 1 ordnance pierhead.

Storage space: 1,800,000 square feet gross, 1,600,000 square feet net.

Investment: Land, nothing yet paid; $159,020 esti-

mated as necessary to make payment. Improvements, $16,500,000. Total investment, $16,659,020.

FOR THE ARMY SUPPLY BASE, NORFOLK, VA., $190,000.

Location: Norfolk, Va.
Acreage: 913.4.
When acquired: 782.83 acres acquired in March, 1918; 35 acres (approximately) acquired in May and June, 1919; 95.97 acres not yet acquired; total, 913.4 acres.
Improvements: Two reinforced-concrete piers with one and two story pier sheds, respectively, eight 1-story warehouses, railroad storage and classification yards having a total of 43.9 miles of track, together with water mains, reservoir, sewer and electrical system, and appurtenances thereto.
Storage space: 2,765,300 square feet gross, 2,451,305 square feet net.
Investment: Land, $2,293,174.91 (acquired), $190,000 (estimated as necessary to complete acquisition). Improvements, $26,675.00; total investment, $29,158,174.91.

FOR THE INTERIOR QUARTERMASTER STORAGE DEPOT, NEW CUMBERLAND, PA., $92,500.

Location: New Cumberland, York County, Pa.
Acreage: 941.5.
When acquired: 403 acres May, 1918; 538.5 acres requisitioned May, 1918. Not yet paid for.
Improvements: Eight fireproof warehouses, two open sheds, railroad and classification yard, barracks and quarters, water-supply mains.
Storage space: 1,946,000 square feet.
Investment: Land, $92,500; improvements, $4,385,000; total, $4,477,500.

FOR THE INTERIOR QUARTERMASTER STORAGE DEPOT, SCHENECTADY, N. Y., $3,000.

Location: Schenectady, N. Y.
Acreage: 231.36.
When acquired: May, 1918, 220 acres; 93 lots yet to be acquired.

Improvements: 8 closed warehouses, 2 open sheds, 42 small cantonment buildings.

Storage space: Amount closed, 2,060,000 square feet; amount open, 537,600 square feet.

Investment: Land, $88,646; improvements, $4,680,000; total, $4,768,646.

FOR THE QUARTERMASTER DEPOT, JEFFERSONVILLE, IND., $225,000.

Location: Jeffersonville, Ind.

Acreage: 261.6.

When acquired: 17.4 acres acquired in 1870; 8.58 acres acquired; 235.62 not yet acquired; total, 261.6 acres.

Improvements—various warehouses of the following classes of construction: Steel frame covered with sheet iron; wood frame covered with sheet iron; brick and concrete; frame together with the necessary railroad spur tracks.

Storage space: 3,852,165 square feet.

Investment: Land, $2,294 (for 8.58 acres acquired since April 6, 1917. Cost of 17.4 acres acquired in 1870 not available); $225,000 estimated as necessary to complete acquisition; $227,000; improvements, $2,732,000; total investment, $2,959,294

FOR THE QUARTERMASTER WAREHOUSE, BALTIMORE, MD., $100,000.

Location: Baltimore, Md.

Acreage: 35.37.

When acquired: None yet completed. Entire area requisitioned in July, 1918.

Improvements: Four good warehouses with brick fire walls, together with railroad facilities, wood garage, and several small frame office buildings.

Storage space: 665,600 square feet net.

Investment: Land, nothing yet paid; $100,000 estimated as necessary to make payment. Improvements, $1,909,000; total investment, $2,009,000.

FOR THE QUARTERMASTER WAREHOUSES, NEWPORT NEWS, VA., $223,670.

Location: Newport News, Va.

Acreage: 41.35.

When acquired: Occupied by lease in 1917 or early part of 1918, at rental of $3,588.48 per annum.

Improvements: Group of semipermanent warehouses (concrete floors, frame superstructure, and brick fire walls), with railroad trackage, concrete roadways, water supply, etc.

Storage space: 420,000 square feet under cover.

Investment: Land, nothing yet paid; $223,670 estimated as necessary to acquire. Improvements, $1,995,000; total investment, $2,218,670.

FOR ARTILLERY RANGE, TOBYHANNA, PA., $7,533.67.

Location: Tobyhanna, Pa.

Acreage, 21,125 acres.

When acquired: 18,942 acres acquired during period from January, 1914, to July, 1918; 2,183 acres not yet acquired.

Improvements: Not available.

Storage space: Not a storage project.

Investment: Land, $56,000 approximate cost of land acquired; $7,533.67 cost of land to be acquired; total, $63,533.67; improvements, not available.

FOR GENERAL HOSPITAL NO. 19, AZALEA, N. C., $58,000.

Location: Azalea, N. C.

Acreage: 375.63.

When acquired: 289.24 acres requisitioned in March and June, 1919, 86.39 acres under contract dated June, 25, 1919.

Improvements: Building comprising General Hospital No. 19, with capacity for 1,300 beds.

Storage space: None.

Investment: Land, nothing yet paid; $58,000 estimated as necessary to acquire land; improvements, $2,668,609; total investment, $2,726,609.

FOR SOUTHER FIELD SEPTIC TANK SITE, AMERICUS, GA., $750.

Location: Americus, Ga.

Acreage 4.6 acres.

NOTE.—Souther Field proper consists of 406.68 acres

which was acquired July 5, 1919, at a cost of $32,534.40.

When acquired: Septic tank site not yet acquired (under condemnation).

Improvements: Septic tank for Souther Field.

Storage space: None.

Investment: Land, nothing yet paid; $750 estimated as necessary to make payment; improvements, $30,000 (cost of improvements for Souther Field proper not available); total investment, $30,750.

FOR SAVANNA PROVING GROUND, SAVANNA, ILL., $500.

Location: Savanna, Ill.

Acreage: 13,172 acres acquired July, 1917-May, 1918; 0.387 acre to be acquired, site and access of observation tower; part of proving facilities, 13,172.387 acres.

Improvements: Proving ground improvements complete, involving telephone system, firing points, observation towers, assembly sheds, bombproofs, machine shops, assembly and storage buildings, all permanent; housing for 11 officers, 4 noncommissioned officers, and 300 men, all permanent.

Storage space: 49 ammunication magazines, 497,084 square feet; 1 nitrate pit, 382,356 square feet general storage (inert), 1,536,000 square feet in 40 units; 30 high-explosive magazines, 42,570 square feet in 120 units.

Investment: Land, $900,000; improvements, $4,986,503, estimated.

FOR DELAWARE ORDNANCE RESERVE DEPOT, PEDRICKTOWN, N. J., $215,652.90.

Location: Pedricktown, Salem County, N. J.

Acreage: 1,540.14 acres.

When acquired: Requisitioned October, 1918, but not paid for.

Improvements: Description—Permanent storage establishment, storage buildings, docks, locomotive house, utilities buildings, permanent construction, housing, temporary construction.

Storage: 32 ammunition magazines, 346,080 square feet; 53 smokeless powder magazines, 150,573 square feet; 8 primer and fuse magazines, 22,728 square feet, 8 general warehouses, temporary type, 17,063 square feet; total 536,444 square feet.

Investment: Land, none; improvements, $3,487,273, approximately.

FOR SEWER RIGHT OF WAY FOR HOUSING PROJECT, BETHLEHEM, PA., $275.

Location: Bethlehem, Pa.
Acreage: Right of way for sewer.
When acquired: May, 1918.
Improvements: Sewer. This is claim for damage for sewer right of way in connection with housing facilities on ordnance contract with the Bethlehem Steel Co. The contract has been closed and the housing facilities disposed of. The award in condemnation for damages sustained, however, remains.

FOR THE MIDDLETOWN ORDNANCE RESERVE DEPOT, MIDDLETOWN, PA., $50,000.

Location: Middletown, Mifflin County, Pa.
Acreage: 89.99.
When acquired: Requisitioned August, 1918, but not paid for.
Improvements: Two permanent warehouses, temporary housing facilities.
Storage space: 320,640 square feet.
Investment: Land, none; improvements, $1,398,700, approximately.

FOR THE ABERDEEN PROVING GROUND, MARYLAND, $174,591.63.

Location: Baltimore and Harford Counties, Md.
Acreage, 35,000.
When acquired: Beginning, October, 1917; acquisition not yet completed; approximately 100 acres not as yet paid for.
Improvements: Barracks, officers' quarters, administration buildings, offices, warehouses, proving grounds, bombing fields, etc.
Storage space: Unknown.
Investment: $7,000,000 appropriated by act approved October 6, 1917. Appropriation increased to $8,480,000 by act approved July 8, 1918. From foregoing appro-

priation $3,563,503.20 has been allotted for procurement of land and payment of damages in connection therewith. Of this allotment, $74,591.63 remains unexpended. In addition to this unexpended balance it would require approximately $100,000 to complete purchase of land and pay land-damage claims. It is understood that practically all of the balance of the appropriation has been expended for buildings and improvements.

The total amount authorized to be appropriated in this bill is $4,140,105.72, which is for the completion of the purchase of the real estate upon which the United States has erected improvements, the value of which is $131,589,131. It is therefore apparent that it is decidedly to the interest of the United States to complete these projects in order to protect the large investment involved.

In conclusion, we feel it proper to state that the purpose of this legislation is to enable the War Department to perfect the title to the various tracts of real estate mentioned in the bill, and upon practically all of which extensive improvements have been made.

Whether the original acquisition of all of this real estate was wise or in the interest of the Government is no longer a debatable question. Under the laws enacted by Congress the power to acquire was exercised and the possession taken from the owners by the agents of the Government who have up to this time been waiting for the settlement of their claims, but being denied on the ground that the limitation placed by Congress in the Army appropriation act approved July 11, 1919, prevents payment.

It may be that all of these tracts of land will not be necessary for the Military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saying anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government.

BILL OF EXCEPTIONS NO. 4.

(82) Filed July 11, 1923.

BE IT REMEMBERED that on the trial of this cause the defendant offered to introduce evidence to prove the value of the warehouses erected by the Government during the period of its lease upon the land sought to be condemned in these proceedings, to the introduction of which evidence the plaintiff, by counsel, objected, and the Court sustained said objection and declined to allow the defendant to offer said evidence as to the value of said improvements upon said property; to which action of the Court the defendant, by its counsel, excepted, and tenders this its Bill of Exceptions Number 4, which it prays may be signed, sealed and made a part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER. (Seal)
U. S. Judge.

BILL OF EXCEPTIONS NO. 5.

(83) Filed July 11, 1923.

BE IT REMEMBERED that on the trial of this cause, after evidence had been introduced by the petitioners and defendant as to the value of said property (which evidence is not incorporated in the record for the reason that the defendant does not complain of the amount of the verdict found by the jury under the charge of the Court), and the defendant had likewise offered to prove the value of the buildings on the property, the defendant, by counsel, requested the Court to charge the jury as follows:

"The Court instructs the jury that in determining what would be just compensation in the case at bar, the jury, in addition to the value of the land plus interest, will add thereto the value of the warehouses erected by the petitioner on said land."

But the Court refused to charge the jury as so requested, and in lieu thereof charged the jury as follows:

"The Court charges you gentlemen of the Jury, that your duty in this case is to ascertain what will be just compensation to the defendant for the land (exclusive of the buildings and improvements thereon) to be taken by the Government for its purposes, in this proceeding, that is to say, what will be a fair equivalent to pay for what is taken and in determining this question you shall be governed by the fair market value of the land, as well for its present purposes, as for those which it may be reasonably adepted at this time or in the immediate future. You shall take into consideration the facts and circumstances of its location; the demand, if any, for the property of the kind; its liability in the near future to increase or decrease in value; and in short, anything shown you by the evidence tending to bear on its present market value, and "by market value is meant the price which a purchaser who desires to buy, but is not compelled to buy, would be willing to pay, and which an owner who desires to sell, but is not compelled to sell, would be willing to accept.

"And the Court further charges the Jury that in determining what will be just compensation to the defendant for the lands in question that the jury are not to take into consideration or allow anything to the defendant for the buildings and improvements placed upon the three tracts of land in question by the United States of America.

"The Court further charges the Jury that in determining what is just compensation for the defendant's interest in the lands in question that they should deduct from the value of said three tracts of land respectively, what the jury believe from the evidence is a fair allowance for the said right of way conveyed by the defendant, Old Dominion Land Company, to the Newport News Light and Water Company."

To which action of the Court in refusing to charge the
(84) jury as requested, and in charging the jury that

the defendant was not entitled to have the jury take into consideration the value of the buildings and improvements upon the land sought to be taken, defendant, by its counsel, excepted, and tenders this its bill of Exceptions Number 5, which it prays may be signed, sealed and made a part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER. (Seal)
U. S. Judge.

BILL OF EXCEPTIONS NO. 6.

(85) Filed July 11th, 1923.

BE IT REMEMBERED that on the trial of this cause, after the petition, and defendant had proved the facts set out in bill of exceptions Number——, which is hereby referred to and made a part of this bill of exceptions, and after introduction of evidence as to the value of the property, which is omitted by agreement of parties, the Court charged the jury as set out in bill of Exceptions Number 5, which is here referred to and made a part of this bill of exceptions, and after hearing the argument of counsel the jury retired to consider their verdict, and after some time returned into Court with following verdict:

We, the jury, being sworn faithfully and impartially (86) to ascertain what will be just compensation to the Defendant for the three parcels of land in these proceedings mentioned, (Subject to the right-of-way of N. N. L. & Water Co.,) after hearing the evidence ascertain that for the land to be taken belonging to the Defendant, Old Dominion Land Company just compensation will be as follows:

TRACT NO. 1.

All that certain tract or parcel of land situate in the City of Newport News, Virginia, and in the County of Warwick immediately adjoining the corporate limits

of the City of Newport News, Virginia, and more particularly bounded and described as a whole as follows:

Beginning at a point, said point being in the east line of Virginia Avenue at its intersection with the north line of fifty eight (58th) Street, and being north sixty three degrees, thirty seven minutes east (N-63 deg. 37'-E.) and distance eighty and no hundredths (80.00) feet from a stone monument at the intersection of the west line of Virginia Avenue and the north line of fifty eighth (58th) street, and running thence (1) north sixty three degrees thirty seven minutes east (N-63 deg. 37'-E) along the said north line of fifty eight (58th) street a distance of three hundred and forty-nine and eighty-eight one hundredths (349.88) feet to a point, said point being in the westerly right of way line of the Chesapeake and Ohio Railway Company; thence (2) south twenty six degrees, twenty three minutes east (S-26. deg. 23' E) along the said right of way line a distance of two thousand one hundred and forty and thirty one one hundredths (2140.31) feet to a point, said point being in the south line of fiftieth (50th) street, thence (3) south sixty three degrees, thirty seven minutes west (S-63 deg. 37' W) along said south line of fiftieth (50) street a distance of fifty and no one hundredths (50.00) feet to a point, said point being also in the said westerly right of way line to the C. & O. Ry. Co., thence, (4) south twenty six degrees, twenty three minutes east (S-26 deg. 23' E) along the said right of way line a distance of two hundred and no one hundredths (200.00) feet to a point, said point being in the north line of forty ninth (49th) street, thence (5) south sixty three degrees, thirty seven minutes west (S-63 deg. 37' W) along the said north line of forty ninth (49th) street a distance of fifty and no hundredths (50.00) feet to a point, said point being the south east corner of lot twenty seven (27) block five hundred and thirteen (513) as shown on map of Newport News, Va., sheet 1 of r sheets, scale one (1) inch equals two hundred (200) feet, and dated August 24, 1921, thence, (6) north, twenty six degrees, twenty three minutes west (N-26 deg. 23' W) along the east line of said lot twenty seven (27) a distance of one hundred and no one hundredths (100.00) feet to a point, said point being the northeast corner of said lot twenty seven (27)

thence (7) south sixty three degrees thirty seven minutes west (S-63 deg. 37′ W) along the north line of said lot twenty seven (27) and lots twenty eight (28), twenty nine (29), thirty (30) thirty-one (31) and thirty two (32) of said block five hundred and thirteen (513) a distance of one hundred and fifty and fifty one hundredths (150.50) feet to a point, said point being the north west corner of said lot thirty two (32) thence (8) north twen- (87) ty six degrees, twenty three minutes west (N-26 deg. 23′ W) along the east line of lots thirty seven (37) thirty eight (38), thirty nine (39) and forty (40) of said block five hundred and thirteen (513) and crossing fiftieth (50th) street, a distance of one hundred and sixty and no hundredths (160.0) feet to a point, said point being in the north line of fiftieth (50) street, thence (9) south sixty three degrees thirty seven minutes west (S-63- deg. 37′ W) along the said north line of fiftieth (50) street a distance of one hundred and no hundredths (100.00) feet to a point, said point being the intersection of the said north line of fiftieth (50th) street and the east line of Virginia Avenue, thence (10) north twenty six degrees, twenty three minutes west (N-26 deg. 23′ W) along the said east line of Virginia Avenue a distance of two thousand and eighty and thirty one hundredths (2080.31) feet to a point of beginning, containing seventeen and sixty four one hundredths (17.64) acres more or less all as shown on map No. 6163- 324, entitled "Property Map of Warehouse Sites, Newport News, Virginia," dated July 25, 1922, filed in the office of the Quartermaster General, Washington, D. C., a copy of which is attached hereto and made a part of this description.

$63,504.

TRACT NO. 2.

All that certain tract or parcel of land situated in the City of Newport News, Virginia and more particularly bounded and described as follows:

Beginning at a point, said point being in the center line of a thirty (30) foot county road leading from Newport News, Virginia, to Hilton, Va., and being also on the

line between Warwick County and the City of Newport News, Va., and one Hundred (100) feet north of the north line of sixty four (64th) street as laid out by the City of Newport News, Va., and running thence (1) North twenty six degrees twenty three minutes West (N 26 deg. 23′ W) along the said center line of said county road a distance of one thousand eight hundred fifty six and forty eight one hundredths (1856.48) feet to a point, said point being in the south line of the Washington McLean tract, thence (2) north forty six degrees and no minutes East (N 46 deg. 0′ E) along the said south line of said Washington McLean Tract a distance of four hundred and seven and ninety four hundredths (407.94) feet to a point in the westerly right of way of the Chesapeake and Ohio Railway Company, thence (3) south twenty six degrees, twenty three minutes East (S-26 deg. 23′ E) along said right of way line a distance of two thousand seven hundred sixty nine and eighty eight hundredths (2769.88) feet to a point, said point being in the north line of the Newport News Light and Power Company's Land; thence (4) south sixty three degrees, thirty seven minutes West (S-63 deg. 37′ W) along the north line just mentioned, a distance of three hundred and forty nine and seventy hundredths (349.70) feet to a point, said point being in the east line of Virginia Avenue; thence (5) North twenty-six degrees, twenty three minutes West (N-26 deg. 23′ W.) along said east line of Virginia Avenue a distance of seven hundred and ninety (790) feet to a point, said point being in said line between Warwick County, and the City of Newport News, Va., thence (6) south sixty three degrees, thirty seven minutes West (S-63 deg. 37′ W.) along line just mentioned a distance of forty and no hundredths (40.00) feet to the point of beginning, containing twenty three and forty seven hundredths (23.47) acres more or less, all as shown on map No. 6136-324, entitled "Property Map of Warehouse Sites, Newport News, Va.," dated July 25, 1922, filed in the office of the Quartermaster General, Washington, D. C., a copy of which is attached hereto and made a part of this description.

$61,022.

TRACT NO. 4.

All that certain tract or parcel of land in the County
(88) of Warwick, Virginia, more particularly bounded and described as follows:

Beginning at a point, said point being in the center line of a thirty (30) foot county road leading from Newport News, Va., to Hilton, Va., and being also in the north line of the Washington McLean tract and running thence (1) North twenty-six degrees, twenty three minutes West (N-26 deg. 23′ W) along the said center line of said county road a distance of two hundred and eighty and fifty two hundred (280.52) feet to a point, thence (2) North sixty three degrees, thirty seven minutes East (N-63 deg. 37′ E) a distance of three hundred and eighty eight and sixty one hundredths (388.61) feet to a point, said point being in the westerly right of way line of the Chesapeake and Ohio Railway Company; thence (3) south twenty six degrees, twenty three minutes East (S-26 deg. 23′ E) along said right of way line a distance of one hundred and sixty five and twenty nine hundredths (165.29) feet to a point, said point being in the aforementioned north line of the Washington McLean tract; thence (4) south forty seven degrees, six minutes West (S. 47 deg. 06′ W) along the north line just mentioned a distance of four hundred and five and fifty five hundredths (405.55) feet to the point of beginning, containing one and ninety nine hundredths (1.99) acres, more or less, all as shown on Map No. 6139-324, entitled "Property Map of Warehouse Sites, Newport News, Va.," dated July 25, 1922, filed in the office of the Quartermaster General, Washington, D. C., a copy of which is attached hereto and made a part of this description.

$5,174.

The grand total for the said three tracts or parcels of land above mentioned and described, being the aggregate value of all the defendant's lands herein enumerated and covered by the proceedings in this cause, is

$129,700

Together with interest thereon at 6% per annum from July 1st, 1922, until paid:

The above awards include any and all damages to adjacent or other property and to any and all parties except the right of way of the N. N. L. & Water Co., owning or claiming any right, title, estate or interest in the adjacent land or other property and to any and all parties owning or claiming to own any right, title, estate or interest in or to the proceeds arising out of the taking of said lands.

F. M. KILLAM,
Foreman.

(89) And thereupon the defendant, by its counsel, moved the Court to set aside the said verdict and grant it a new trial, on the ground that the said verdict was contrary to law and the evidence, for error in the charge of the Court to the jury, and for refusal to charge the jury as requested by the defendant as set out in Bill of exceptions Number 5; but the Court refused to set aside said verdict and grant a new trial, to which ruling of the Court the defendant, by its counsel, excepted, and tenders this its bill of exceptions Number 6, which it prays may be signed, sealed and made a part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER. (Seal)
U. S. Judge.

ASSIGNMENT OF ERRORS.

(90) Filed July 12, 1923.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of errors:

1. The Court erred in overruling the defendant's motion to dismiss the petition of the plaintiffs.

2. The Court erred in overruling the defendant's demurrer to the amended petition.

3. The Court erred in overruling the defendant's motion to dismiss the amended petition.

4. The Court erred in overruling the defendant's motion to dismiss the plaintiffs' amended petition because of the variance between its allegations and the letter from the Secretary of War to the Attorney General.

5. The Court erred in declining to consider any of the facts proved by the defendant upon its motion to dismiss the plaintiff's petition, and in overruling said motion to dismiss.

6. The Court erred in refusing to charge the jury that the defendant was entitled to have the improvements placed upon the property during the terms of the lease and not removed therefrom within thirty days after the expiration thereof considered by the jury in estimating the value of the property sought to be condemned in these proceedings, and in charging the jury that the defendant was not entitled to have the value of such improvements so considered by the jury.

7. The Court erred in refusing to set aside the verdict of the jury and grant the defendant a new trial.

R. G. BICKFORD,
THOS. H. WILLCOX,
J. WINSTON READ.

STIPULATION.

(91) Filed August 1, 1923.

It is stipulated by the parties hereto that in making up the record for the appeal the Clerk will only include the following:

1. Petition of the United States, and the exhibits

filed therewith, and Clerk's notation showing time of filing of petition.

2. Motion of the Old Dominion Land Company to dismiss petition.

3. Amended petition and the exhibits therewith.

4. Demurrer to amended petition, and the order overruling the same.

5. Motion to dismiss amended petition.

6. Order overruling motion to dismiss (February 14, 1923).

7. Answer to amended petition, and exhibits filed therewith, including leases and renewals and correspondence covering negotiations for purchase.

8. Opinion of the Court.

9. Charge of the Court to the jury.

10. Verdict of the jury.

11. Order overruling motion for new trial and entering judgment upon verdict.

12. Order filing Bills of Exceptions.

13. Six Bills of Exceptions.

14. Assignment of Errors.

R. G. BICKFORD,
J. WINSTON READ,
WILLCOX, COOKE AND WILLCOX.
Counsel for Old Dominion Land Company.

PAUL W. KEAR,
U. S. Attorney.

(92)

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD.

(1) Petition for Writ of Error, filed July 12, 1923.

(2) Order allowing Writ of Error, Ent. & Filed July 12, 1923.

(3) Order Staying Proceedings, Ent. July 12, 1923.

(4) Writ of Error dated July 12, 1923. Copy of Writ of Error lodged in Clerk's office for the Adverse Party.

(5) Citation dated July 12, 1923. Service Accepted.

(6) Appeal Bond dated July 30th, 1923. Obligors Old Dominion Land Company, Principal, and W. B. Livezey, Surety. Penalty $500.00. Conditioned for Damages and Costs.

(93)

CERTIFICATE OF THE CLERK.

UNITED STATES OF AMERICA,
Eastern District of Virginia, SS:

I, JOSEPH P. BRADY, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of proceedings and judgment of the said Court as stipulated by counsel of record, in the therein entitled cause.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District this 17th day of August, 1923.

JOSEPH P. BRADY,
Clerk, U. S. District Court.
By PAUL R. FLANAGAN,
Deputy Clerk, U. S. District Court.

(Seal)

On the same day, to-wit, August 18, 1923, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the original order of District Court staying proceedings pending writ of error sent up.

Same day, the appearance of Thos. H. Willcox, J. Winston Read and R. G. Bickford is entered for the plaintiff in error.

August 23, 1923, the appearance of Paul W. Kear, U. S. Attorney, is entered for the defendant in error.

September 5, 1923, twenty-five copies of the printed record are filed.

September 6, 1923, original exhibits are certified up.

September 22, 1923, the appearance of Luther B. Way, Special Assistant to U. S. Attorney, is entered for the defendant in error.

October 25, 1923, stipulation as to briefs filed.

ARGUMENT OF CAUSE.

December 4, 1923 (November Term, 1923), cause came on to be heard before Woods, Waddill and Rose, Circuit Judges, and is argued by counsel, and submitted.

OPINION.

Filed February 5, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 2153.

Old Dominion Land Company, a Corporation, Plaintiff in Error,

versus

United States of America, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued December 4, 1923. Decided February 5, 1924)

Before WOODS, WADDILL and ROSE, Circuit Judges.

THOMAS H. WILLCOX and J. WINSTON READ (R. G. BICKFORD on brief), for Plaintiff in Error, and PAUL W. KEAR, U. S. Attorney, and LUTHER B. WAY, Special Assistant U. S. Attorney, for Defendant in Error.

WOODS, Circuit Judge:

The main question to be decided is whether the Dis-

trict Court was right in holding that the United States had the right to condemn certain lands of the Old Dominion Land Company, and in refusing a motion to dismiss the proceedings. On July 1, 1918, the Government leased three vacant tracts of land from the Land Company for the year beginning July 1, 1918. The lease was continued by renewals until July 1, 1922. The right of renewal included the period of the Great War and the time necessary for the return of Federal troops from Europe. The contracts provided that all buildings and other improvements should remain the property of the Government, with the right of removal during the lease and its renewals and within thirty days after the expiration of the term of the last renewal. The property was intended and was used in the construction thereon of quartermaster warehouses in connection with the embarkation of troops and the army supply base at Norfolk. The warehouses, railroad switches and sidings and other structures cost the Government $1,522,000. The Land Company refused to continue the renewal expiring June 30, 1922, and gave notice that it would hold the Government to its contract period of thirty days in which it could remove the warehouses.

An effort was made by the Secretary of War to purchase the land in 1919, which was unsuccessful because of failure to agree on the price. The Act of March 8, 1922, amended the Army Appropriation Act of 1919: "so as to release appropriations for the completion of the acquisition of real estate in certain cases and making additional appropriations therefor." This Act contained the appropriation "For quartermaster warehouses Newport News, Virginia, $223,670." The similar Appropriation Act of July 1, 1922, appropriating funds for the acquisition of real estate in certain cases, specified: "For quartermaster warehouses at Newport News." These Acts related to the property herein involved. On July 9, 1922, the War Department sought to acquire the land by purchase under authority of the statutes above recited, offering to pay $3,000 an acre. On July 28, 1922, the board of directors of the Land Company refused the offer, and notified the War Department of the refusal by letter on July 31, 1922, the day after the expiration of the thirty days within which the Government had the right to remove the warehouses and

other structures. On July 29, one day before the expiration of the thirty days, the Government filed its petition for the condemnation of the property.

It is first argued against the right of condemnation that it is not authorized but negatived by the Acts of March 8 and July 1, 1922. The Acts do say that the appropriations are made for the "completion of the acquisition of real estate, etc.," giving thus the general indication that the appropriations were to be applied in payment of purchase money contracted for or to be ascertained by condemnation proceedings already begun or authorized. But this general provision must yield to the clearly expressed particular provision that the property to be acquired was the land "for the quartermaster warehouses at Newport News," although no proceedings for its acquisition had been instituted. Such clearly expressed meaning cannot be altered by the tenor of preliminary committee reports or congressional discussion. *United States* vs. *Chase*, 135 U. S. 255, 262.

The position next taken is that the Government is attempting to condemn land in order that it may save itself from the loss of the value of the warehouses and other structures placed on it; and that it has no intention of using the land for any public purpose, but on the contrary intends to lease or sell it to private persons for business purposes. The Court cannot deny the truth or good faith of the expressed declaration in the statute that the property is to be taken for the plainly public use of quartermaster warehouses. In *Sears* vs. *City of Akron*, 246 U. S. 242, at page 251, the Supreme Court says:

"It is well settled that while the question whether the purpose of a taking is a public one is judicial, *Hairston* vs. *Danville Western Ry. Co.*, 208 U. S. 598; the necessity and proper extent of a taking is a legislative question. *Shoemaker* vs. *United States*, 147 U. S. 282, 298; *United States* vs. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685; *United States* vs. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 65."

United States vs. *Des Moines Railway & Navigation Company*, 142 U. S. 510, 546.

We do not think it appears that before the condem-

nation proceedings Congress had abandoned the purpose to use the property for the public purposes expressed in the statute. It is contended that the purpose of the Government not to use the land for public purposes is shown by the fact that the Secretary of War before the institution of the condemnation proceedings had been negotiating for the sale of the land and warehouses as surplus property not needed by the Government, and that on July 28, 1922, the Assistant Secretary of War executed a six months lease of the property to Edward W. Walcott, revocable at the will of the Secretary of War. This does not justify the conclusion that the Government intends to sell the property. The provision for the disposition of property by the Secretary of War contained in the Appropriation Act of 1919 does not seem to authorize the Secretary of War to dispose of property acquired after its passage.

Even, however, if the Congress had expressed the intention to dispose of the warehouses and land, we think the condemnation would, nevertheless, have been for a public purpose and use. The term "public use" cannot be limited by inflexible definition. At one time the right of condemnation for public parks and play grounds, now unquestioned, was strenuously contested. *Shoemaker* vs. *United States*, 147 U. S. 282. The Government in the haste and stress of war made many improvident contracts and expended vast sums of money in constructions for temporary use. We have before us one of these war investments of $1,522,000 in building warehouses and other structures on leased property valued by the jury at $129,700. At the time of the commencement of the condemnation proceedings the Government had title to the warehouses and the right of removal, with one day in which to exercise the right. The defendant had no right whatever to the warehouses. Since the price of the land could not be agreed on the only method of preventing an immense loss to the public and an immense unearned gain to the land owner was the condemnation of the land. To hold such a condemnation not to be for a public use would be to give away immense public treasure by a narrow and technical limitation of the meaning of "public use." Therefore, assuming that the condemnation was for the sole purpose of salvage of public treasure which could be saved in no

other way, it was for a public use. This conclusion is in accord with the principle applied in *Strickland* vs. *Highland Boy Gold Mining Company*, 200 U. S. 527; *Hairston* vs. *Danville & Western Railway Company*, 208 U. S. 598; *Brown* vs. *United States*, —— U. S., decided November 12, 1923.

The District Court charged the jury that they should take into consideration all elements entering into the value of the land, including the surrounding improvements. Error is assigned in the instruction that they were not to include the value of the warehouses and other structures put on the land by the Government. Under the terms of the lease the Government owned the warehouses, with the right of taking them away or destroying them. The defendant had no interest in them. Evidently, therefore, the defendant had no right to receive payment from the Government for its own property. The case is much stronger against the defendants than *Consolidated Turnpike Co.* vs. *Norfolk & Ocean View Railway Co.*, 228 U. S. 596, wherein the owner of land was denied the value of improvements placed upon it.

Affirmed.

JUDGMENT.

Filed and Entered February 9, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 2153.

Old Dominion Land Company, a Corporation, Plaintiff in Error,

vs.

United States of America, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Virginia.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

C. A. WOODS,
U. S. Circuit Judge.

February 9, 1924.

PETITION FOR A STAY OF THE MANDATE.

Filed March 8, 1924.

(Title omitted.)

To the Honorable Judges of the United States Circuit Court of Appeals:

The Old Dominion Land Company, plaintiff in error in the above-styled case, by counsel, respectfully makes application to this honorable Court for a stay of the mandate for thirty (30) days from the 11th day of March, 1924, in order to give the said plaintiff in error an opportunity to prepare all necessary papers to perfect its writ of error to the United States Supreme Court. And it will ever pray, etc.

OLD DOMINION LAND COMPANY,
a Corporation,
By J. WINSTON READ, Counsel.

ORDER STAYING MANDATE.

Filed March 10, 1924.

(Title omitted.)

Upon the Application of the Plaintiff in Error, by J. Winston Read, its attorney, and for good cause shown,

It is Ordered that the mandate of this Court in this

cause be, and it is hereby, stayed for thirty days from this date.

C. A. WOODS,
Senior Circuit Judge.

March 10, 1924.

PETITION FOR WRIT OF ERROR.

Filed April 9, 1924.

To the Honorable Judges of the Supreme Court of the United States:

The petition of the Old Dominion Land Company, a Corporation organized and existing under the laws of the State of Virginia, with its principal office in the City of Newport News, Virginia, plaintiff in error in the above-styled action, respectfully represents that it is aggrieved by a judgment rendered in the above case by the United States Circuit Court of Appeals for the Fourth Circuit, on the 9th day of February, 1924, affirming a judgment of the District Court of the United States for the Eastern District of Virginia, at Norfolk, in said cause, on the 21st day of May, 1923, in an action or condemnation proceeding seeking to take or condemn the property of petitioner and awarding to it the sum of ONE HUNDRED AND TWENTY-NINE THOUSAND, SEVEN HUNDRED DOLLARS ($129,700.00), with interest from the 1st day of July, 1922, until paid, as the value of the land sought to be taken in said action.

The lands sought to be condemned were for many years prior to the war, and at all times since, owned by the plaintiff in error, Old Dominion Land Company. The only right the United States has ever had, or has ever pretended to have in these lands was under certain leases dated July 1, 1918, and various renewals of said leases, the last of which said renewals expired with the 30th day of June, 1922.

The War Department had originally leased these lands from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom, within thirty (30) days from the expiration of the lease, the improvements placed thereon during the term of the said lease. During the term of said

lease, certain warehouses were placed thereon by the United States, and these had not been removed from the premises within the period prescribed by the lease.

The land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, nor any judicial or administrative award made with respect thereto at anytime.

1. The original petition of the United States relied on the Acts of Congress of August 1, 1888, March 8, 1922, and July 1, 1922, to justify the condemnation. The petition alleged, among other things, that the land therein described was needed by petitioners for a site for quartermaster warehouses for the use of naval and military forces, and/or inland or port storage and shipping facilities and for other purposes, and for public buildings desired by the United States of America.

The defendant, Old Dominion Land Company, moved to dismiss the petition on sundry grounds, and the court sustained said motion to the extent that the petition failed to show that in the opinion of the Secretary of War, or any other officer of the United States Government, it was necessary or advantageous to the United States that the lands mentioned in the petition should be acquired by condemnation by the United States, but overruled said motion in all other particulars, to which action of the Court the said Old Dominion Land Company duly excepted. Thereupon, on motion of the United States, leave was granted to amend their petition by striking out the words, in the second paragraph, "or naval and" and the words "and for other purposes", and on like motion, leave is granted the petitioners to amend the seventh paragraph of their petition to read as follows: "That the Secretary of War has officially determined that it is necessary and advantageous for the petitioners to acquire the lands hereinbefore mentioned and referred to by condemnation proceedings, under judicial process, and has certified that fact to the Attorney General of the United States, and that these proceedings are instituted by direction of the Attorney General of the United States, acting in that behalf and in accord-

ance with the request of the Secretary of War, and under the authority of the Acts of Congress aforesaid. The petitioners file herewith as a part of this petition, photostatic copy of a letter of the Secretary of War to the Attorney General of the United States, dated July 21, 1922, and marked "Exhibit 1-a."

2. The Old Dominion Land Company moved to dismiss and demurred to said amended petition on sundry grounds set out in writing, including the grounds that the allegations of the petition did not set up the conditions precedent mentioned in the Acts of March 8, 1922, and July 1, 1922, which were essential to bring the property sought to be condemned within the terms of said Acts, and further that the Act of March 8, 1922, relied on in the petition, was in violation of the Constitution of the United States, and especially the Fifth Amendment thereto, in that it deprived the owners of the property sought to be condemned of said property without due process of law, and takes private property for public use without just compensation. But the Court overruled said motion to dismiss, and likewise overruled said demurrer, to which rulings of the Court the Old Dominion Land Company duly excepted.

3. Thereupon the Old Dominion Land Company filed its answer to the petition of the United States, alleging, among other things, that the sundry Acts of Congress above mentioned did not authorize the condemnation of its property; that the Act of March 8, 1922, was unconstitutional in providing that any addition to the value of the premises, resulting from the improvements thereto, or in the vicinity thereof, made by, or at the expense of the United States, should be excluded from the sum paid to, or recovered by the owners; that the said land was no longer required for military purposes, or other public use, and that the sole object of the condemnation proceedings was to acquire title to the land in order that the same might be sold or leased by the United States to commercial interests; and setting up sundry other defenses, reference being made to said answer for a specification of the same.

4. At the trial of the case the United States of

America introduced no evidence (save on the question of damages), but relied entirely on the Acts of Congress aforesaid, and took the position that the Acts of Congress aforesaid were conclusive upon the Court.

Thereupon the Old Dominion Land Company proved the following facts: That the War Department had leased the land sought to be condemned in these proceedings from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom the Old Dominion Land Company on the 1st day the improvements placed thereon by the lessee during the term of said lease; that during the term of said lease certain warehouses were placed thereon by the petitioners; and that these had not been removed from the premises within the period prescribed by the lease. The defendant proved that the land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, unless the letter of Secretary of War Baker filed with petition as amended constitutes the beginning of such proceedings; nor any judicial or administrative award made with respect thereto at any time; that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department, acting for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had been referred by Congress for consideration and report, which bill was subsequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act", etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment in the buildings on said property and that the amounts asked for was for the purpose of completing obligations incurred by the War Department during the process of acquiring the real estate upon which the buildings were located, and made such other statements and representatives as caused the House Committee to make a certain report to the House of Representatives, being Mr. McKenzie's Re-

port No. 183, marked "Exhibit A" in the record, and likewise a report to be made by the Senate Committee on Military Affairs, to the Senate, being Mr. Wadsworth's report No. 215, marked "Exhibit B" in the record.

And defendant further proved prior to the institution of these proceedings that the War Department had been engaged in negotiations for the sale of the warehouses on the said land to various parties; and that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of the said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, Mayor of Newport News, Virginia, that the said warehouses were surplus property and were not needed by the Government; and on the 18th day of July, 1922, caused to be executed by the Assistant Secretary of War a contract for the lease of the same to Edward W. Wolcott, a citizen of the City of Norfolk, Virginia, who was in no wise connected with the United States Government.

The District Court, however, refused to consider any of the facts proved by the defendant, and held that the Acts of Congress dated March 8, 1922, and July 1, 1922, authorized this condemnation proceeding and were conclusive upon the Court, to which ruling the Old Dominion Land Company duly excepted.

Thereupon the jury, after having heard the charge of the Court, returned their verdict, awarding to the Old Dominion Land Company the sum of ONE HUNDRED AND TWENTY-NINE THOUSAND, SEVEN HUNDRED DOLLARS ($129,700.00) as the value of said land. The charge of the Court expressly excluded the value of the improvements placed on the land by the United States of America, to which portion of the charge the Old Dominion Land Company duly excepted.

Judgment was then entered by the Court on the verdict of the jury.

A motion for a new trial was made by the defendant and overruled, to which ruling the said defendant excepted.

5. The case was taken by writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which Court affirmed the judgment of the District Court.

In said Circuit Court of Appeals your petitioner argued the various questions raised before the District Court on motion to dismiss, demurrer, and answer, but all of said questions were decided adversely to petitioner's contention.

6. There is filed with this petition an Assignment of Errors, setting up, separately and particularly, each error asserted and intended to be urged before this Honorable Court.

WHEREFORE, your petitioner prays that a writ of error may issue, and that it may be allowed to bring up for review before the Supreme Court of the United States, the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit, as well as the judgment of the District Court of the United States for the Eastern District of Virginia; and that your petitioner may have such other, and further relief in the premises as may be just. And it will ever pray, etc.

OLD DOMINION LAND COMPANY,
By W. B. LIVEZEY, President.

R. G. BICKFORD,
THOMAS H. WILLCOX,
J. WINSTON READ, Attys.

VIRGINIA,
City of Newport News, to-wit:

This day personally appeared before me, the undersigned, a Notary Public of and for the City aforesaid, and the State of Virginia, W. B. LIVEZEY, President of the within named Old Dominion Land Company, who made oath and says that the allegations of the foregoing petition are true to the best of his information, knowledge and belief.

(Seal of Notary) JESSIE M. HUDGINS,
Notary Public.

My Commission Expires February 9, 1927.

ASSIGNMENT OF ERRORS.

Filed April 9, 1924.

And now comes the Old Dominion Land Company, a Corporation, plaintiff in error, by R. G. Bickford and Thomas H. Willcox and J. Winston Read, its attorneys, and says that in the record and proceedings, and the judgment rendered in the United States Circuit Court of Appeals for the Fourth Circuit, there is manifest error, and petitioner, in connection with its petition for a writ of error, makes the following assignment of errors:

1. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the petition of the plaintiffs.

2. The District Court of the United States for the Eastern Disriet of Virginia, erred in overruling the defendant's demurrer to the amended petition.

3. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the amended petition.

4. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the plaintiff's amended petition because of the variance between its allegations and the letter from the Secreary of War to the Attorney General.

5. The District Court of the United States for the Eastern District of Virginia, erred in declining to consider any of the facts proved by the defendant upon its motion to dismiss the plaintiff's petition, and in overruling said motion to dismiss.

6. The District Court of the United States for the Eastern District of Virginia, erred in refusing to charge the jury that the defendant was entitled to have the improvements placed upon the property during the terms of the lease and not removed therefrom within thirty days after the expiration thereof considered by the jury

in estimating the value of the property sought to be condemned in these proceedings, and in charging the jury that the defendant was not entitled to have the value of such improvements so considered by the jury.

7. The District Court of the United States for the Eastern District of Virginia, erred in refusing to set aside the verdict of the jury and grant the defendant a new trial.

8. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the petition of the plaintiffs.

9. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's demurrer to the amended petition.

10. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the amended petition.

11. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the plaintiff's amended petition because of the variance between its allegations and the letter from the Secretary of War to the Attorney General.

12. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in declining to consider any of the facts proved by the defendant upon its motion to dismiss the plaintiff's petition, and in overruling the said motion to dismiss, which facts are set out in Bill of Exception No. 3, and found on top paging 62 to 86, inclusive, of the printed record, and are as follows:

"BE IT REMEMBERED that on the trial of this cause, the petitioners proved that the War Department had leased the land sought to be condemned in these pro-

ceeding from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom, within thirty days after the expiration of the lease, the improvements placed thereon by the lessee during the term of said lease; that during the term of said lease certain warehouses were placed thereon by the petitioners; and that these had not been removed from the premises within the period prescribed by the lease. The defendant proved that the land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, unless the letter of Secretary of War Baker filed with petition as amended constitutes the beginning of such proceedings; nor any judicial or administrative award made with respect thereto at any time; that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department, acting for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had been referred by Congress for consideration and report, which bill was subsequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act", etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment in the buildings on said property and that the amounts asked for was for the purpose of completing obligations incurred by the War Department during the process of acquiring the real estate upon which the buildings were located, and made such other statements and representatives as caused the House Committee on Military Affairs to Report to the House of Representatives as per copy of report hereto attached Marked Exhibit 'A' (Mr. McKenzie's Report No. 183), and which caused a report to be made to the Senate by the Senate Committee of Military Affairs, as per copy of report hereto attached marked 'Exhibit B' (Mr. Wadsworth Report No. 215):

"And defendant further proved prior to the insti-

tution of these proceedings that the War Department had been engaged in negotiations for the sale of the warehouses on the said land to various parties; and that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of the said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, Mayor of Newport News, Va., that the said warehouses were surplus property and were not needed by the Government; and on the 18th day of July, 1922, caused to be executed by the Assistant Secretary of War a contract for the lease of the same to Edward W. Wolcott, a citizen of the City of Norfolk, Va., who was in no wise connected with the United States Government, which lease is in the following words and figures:

'REVOCABLE RELEASE.'

'THIS LEASE made between the Secretary of War, of the first part, and EDWARD W. WOLCOTT, Attorney, of Norfolk, Virginia, of the second part, WITNESSETH: That the Secretary of War by virtue of the authority conferred on him by an Act of Congress approved July 28, 1892 (27 Stat. 321), entitled an Act Authorizing the Secretary of War to lease public property in certain cases', and in consideration of the monthly rental of $1560.00 payable in advance on or before the fifth day of each month, the first payment to be made at the time of delivery of this lease to the lessee, hereby leases to the party of the second part, hereinafter designated as the lessee, for six months, commencing August 1, 1922, but revocable at will by the Secretary of War, the following described premises and property located at Newport News, Virginia:

All that land and buildings known and described as twenty-one warehouses, comprising groups 2 and 3, with the exception of the two now temporarily used by the Newport News Shipbuilding and Dry Dock Company, together with such machinery and equipment as is incident thereto, and the use of the railroad tracks necessary for the proper use of the warehouses under this lease.

It is provided that the above mentioned land, buildings, machinery, equipment and railroad tracks shall be kept in good condition, order and repair, ordinary wear

and tear excepted, and returned to the lessor at the expiration or revocation of this lease. It is understood by the lessee that the United States Government does not have title to the land on which the within warehouses stand, and that this lease is granted subject to such action as the owners of the real estate might legally take. It is further understood that this lease is to be operative and binding to the lessee only in the event that it is possible to have the same bonded by the United States Government, so as to make them bonded warehouses.

And the lessee hereby covenants to pay to the United States the monthly rental above reserved on the dates above mentioned; that this lease shall be revocable at will by the Secretary of War; and to pay to the United States on demand any sum which may have to be expended after the expiration or revocation of this lease in putting the said premises or property in as good condition for use by the United States as it is at the date of the execution of this lease.

And it is still further agreed that after the expiration or revocation of this lease the lessee shall remove any construction or other property which it may have on said premises, within such time as the Secretary of War may indicate; and upon its refusal, neglect, or inability to remove the same, the Secretary of War may cause them to be removed at the expense of the lessee and no claim for damages against the United States, or any agent thereof, shall be credited by or made on account of such removal.

WITNESS my hand and seal of the War Department this 18th day of July, 1922.

(Signed) J. M. WAINWRIGHT,
(Seal) The Assistant Secretary of War.

THIS LEASE is also executed by the Lessee this — day of ————, 1922.

————————, Attorney.

Signed and sealed in the presence of

————————

————————————.'

The said lease was never actually executed by the said E. W. Wolcott.

And the petitioners proved that the Judge Advocate General of the War Department advised the Secretary of War that such contract was not legal at that time;

WHEREUPON the defendant, by counsel, upon the facts so proven requested the Court to dismiss these proceedings;

But the petitioners, by their counsel, objected to the consideration of the facts proved by the defendant, which motion the Court sustained upon the ground that the Acts of Congress dated March 8, 1922, and July 1, 1922, respectively, were conclusive upon the Court, as set out in its opinion.

To which action of the Court, the defendant, by its counsel, excepted, and tenders this its bill of exception number 3, which it prays may be signed, sealed and made part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER, (Seal)
U. S. Judge.

EXHIBIT "A."

HOUSE OF REPRESENTATIVES.

th Congress
st Session

Report
No. 183

AMENDMENT OF ARMY APPROPRIATION ACT APPROVED JULY 11, 1919.

June 16, 1921.—Committed to the Committee of the hole House on the state of the Union and ordered to be nted.

Mr. McKenzie, from the Committee on Military Affairs, submitted the following

REPORT.

(To accompany H. R. 7158.)

The Committee on Military Affairs, to whom was referred the bill (H. R. 7158) to amend the Army appropriation act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases, and making additional appropriations therefor, having considered the same, report thereon with a recommendation that it do pass.

The members of the committee, realizing the importance of this bill and being desirous of giving the House such information as will enable the Members of Congress to understand fully the purposes of the same, have undertaken to set forth in some detail the laws under which the obligations were incurred by the Government, together with a brief statement covering the location, extent, value, and use of the several tracts involved, as follows:

During the war it became necessary to acquire various tracts of land for use by the military forces of the country in the pursuit of its operations. Under the laws then existing it was difficult and almost impossible to gain immediate possession of the property required. Thus, after having been presented to Congress, emergency legislation was enacted which authorized the President to take over forthwith such properties as were deemed essential to the prosecution of the war. This law, known as the food and fuel act, was enacted August 10, 1917, and reads in part, as follows:

(Act of Congress approved August 10, 1917 (40 Stat., 276, 279), being an act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.)

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and he shall

ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies: PROVIDED, That nothing in this section or in the section that follows shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Under this authority many of the activities under control of the War Department were requisitioned in order that immediate possession might be taken of the property, and the matter of examining title and completing payment was delayed until a future time. At that time Congress had made sufficient appropriation to cover all of the projects necessary in the prosecution of the war with the Central Powers. Such appropriations as had been made were available for the completion of all projects begun and the payment of awards made by those agencies of the War Department constituted for the purpose of hearing disputes as to land values, etc., until the enactment of the Army appropriation bill for 1920, which was approved July 11, 1919, and which carried an amendment reading as follows:

* * * (Restrictions in the use of appropriations.) That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate for the construction of Army camps or cantonments, except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or can-

tonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necesasry in order to protect the interests of the Government.

The above provision therefore prohibited the completion of any contracts for the purchase of real estate, or payment of any awards which may have been made in the acquisition thereof.

H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above-mentioned restrictive act, and in each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the department. These projects are as follows:

* * * * * * * *

For the Quartermaster Warehouses, Newport News, Va., $223,670.

Location: Newport News, Va.

Acreage: 41.35.

When acquired: Occupied by lease in 1917 or early part of 1918, at rental of $3,588.48 per annum.

Improvements: Group of semipermanent warehouses (concrete floors, frame superstructure, and brick fire walls), with railroad trackage, concrete roadways, water supply, etc.

Storage space: 420,000 square feet under cover.

Investment: Land, nothing yet paid; $223,670 estimated as necessary to acquire. Improvements, $1,995,000; total investment, $2,218,670.

The total amount authorized to be appropriated in this bill is $4,140,105.72, which is for the completion of the purchase of the real estate upon which the United States has erected improvements, the value of which is $131,589,131. It is therefore apparent that it is decid-

edly to the interest of the United States to complete these projects in order to protect the large investment involved.

In conclusion, we feel it proper to state that the purpose of this legislation is to enable the War Department to perfect the title to the various tracts of real estate mentioned in the bill, and upon practically all of which extensive improvements have been made.

Whether the original acquisition of all of this real estate was wise or in the interest of the Government is no longer a debatable question. Under the laws enacted by Congress the power to acquire was exercised and the possession taken from the owners by the agents of the Government who have up to this time been waiting for the settlement of their claims, but being denied on the ground that the limitation placed by Congress in the Army appropriation act approved July 11, 1919, prevents payment.

It may be that all of these tracts of land will not be necessary for the military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saying anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government.

EXHIBIT "B."

CALENDAR NO. 227.

67th Congress, 1st Session. SENATE Report No. 215.

AMENDMENT OF ARMY APPROPRIATION ACT APPROVED JULY 11, 1919.

July 8, 1921,—Ordered to be printed.

Mr. Wadsworth, from the Committee on Military Affairs, submitted the following

REPORT.

(To accompany H. R. 7158.)

This report of the Senate Committee, No. 215, is identical in all respects with the foregoing Report of the House Committee, No. 183, and will, therefore, not be copied at length herein. It is found on pages 76 to 86, inclusive, of the printed record.

13. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the action of the District Court in refusing to give the following prayer or instruction at the request of the defendant, the Old Dominion Land Company:

"The Court instructs the jury that in determining what would be just compensation in the case at bar, the jury, in addition to the value of the land plus interest, will add thereto the value of the warehouses erected by the petitioner on said land."

14. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the action of the Distirct Court in charging the jury as follows:

"The Court charges you gentlemen of the jury, that your duty in this case is to ascertain what will be just compensation to the defendant for the land (exclusive of the buildings and improvements thereon) to be taken by the Government for its purposes, in this proceeding, that is to say, what will be a fair equivalent to pay for what is taken and in determining this question you shall be governed by the fair market value of the land, as well for its present purposes, as for those which it may be reasonably adopted at this time or in the immediate future. You shall take into consideration the facts and circumstances of its location; the demand, if any, for the property of the kind; its liability in the near future to increase or decrease in value; and in short, anything shown you by the evidence tending to bear on its present market value and 'by market value is mean t the price which a purchaser who desires to buy, but is not compelled to buy, would be willing to pay, and which a

owner who desires to sell, but is not compelled to sell, would be willing to accept.

"And the Court further charges the Jury that in determining what will be just compensation to the defendant for the lands in question that the jury are not to take into consideration or allow anything to the defendant for the buildings and improvementts placed upon the three tracts of land in question by the United States of America.

"The Court further charges the jury that in determining what is just compensation for the defendant's interest in the lands in question that they should deduct from the value of said three tracts of land respectively, what the jury believe from the evidence is a fair allowance for the said right of way conveyed by the defendant, Old Dominion Land Company, to the Newport News Light and Water Company."

15. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the Acts of Congress of March 8, 1922, and July 1, 1922, authorized the taking of plaintiff in error's property in this condemnation proceeding.

16. The United States Circuit Court of Appeals for the Fourth Circuit erred in construing the said Acts of Congress in not considering the reports of the House and Senate Committees, as well as Congressional discussion which led to the passage of the Act of March 8, 1922. The said reports will be found on pages 66-86, inclusive, of the printed record.

In submitting the said reports Mr. McKenzie, of the House Committee, and Senator Wadsworth, of the Senate Committee, used the same language, which is in part as follows:

"H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above-mentioned restrictive act (Act of July 11, 1919), and in each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorizing agent of the department."

* * * * * * *

"It may be that all of these tracts of land will not be necessary for the Military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saving anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government."

(Rec., pp. 68, 76, 79, 86.)

The Congressional discussion which led to the passage of the Act of March 8, 1922, and which is relied on by the plaintiff in error, is as follows:

"By Mr. Kahn: A bill (H. R. 7158) to amend the Army appropriation act, approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases and making additional appropriations therefor; to the Committee on Military Affairs."

(Congressional Rec. June 15, 1921, p. 2701.)

"Mr. McKenzie, from the Committee on Military Affairs, to which was referred the bill (H. R. 7158) to amend the Army appropriation act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases, and making additional appropriations therefor, reported the same without amendment, accompanied by a report (No. 183), which said bill and report were referred to the Committee of the Whole House on the state of the Union."

(Congressional Rec. June 16, 1921, p. 2761.)

"The only purpose of this bill is to authorize the appropriation of a sufficient amount of money to cover the balances due on these various projects and to enable the citizens of our own country to get what rightly and justly

belongs to them. It is not the purpose of the Committee on Military Affairs at this time to undertake to justify all these projects. In my judgment many of them were unnecessary; many of them, perhaps, were purchased in the heat of conflict and excitement of war, but are of no earthly military use to the Government at this time.

But that is not the question involved. The Government has expended something like $131,000,000 on these various projects, and we owe a little over $4,000,000 to complete the title. Now, gentlemen, it is a simple business proposition."

"By Mr. Kahn: The War Department stated to the committee that by finishing the purchase of some of these lands it would be an easy matter to sell it to the great advantage of the Government, and by perfecting the title in the way the gentleman from Illinois is explaining the Government will probably get back a good percentage of the money that has already been paid out."

(Congressional Rec. June 30, 1921, p. 3413.)

"Mr. McKenzie: We have spent millions of dollars down there, and if it was a mistake to locate it there, we are not chargeable with that. But the citizens whose lands have been taken are entitled to compensation, and this bill is for that purpose, and the use we can make of that property, if we get it, will have to be hereafter determined. I think it was a mistake to locate there."

(Congressional Rec. June 30, 1921, p. 3415.)

"Mr. Greene of Vermont: Mr. Chairman, my colleague the gentleman from Illinois (Mr. McKenzie), who is in charge of this bill, informs me that the opening paragraph of the statement of Brig. Gen. Carson, of the Quartermaster Corps, in the hearings on this bill has not been formally called to your attention, and as I know from experience that it is somewhat inconvenient to get copies of these hearings on rather sudden notice, like this, I ask your indulgence while I read that opening paragraph to you. I do this because it seems to me that the whole story of the bill, its purpose and its intent, is told in this opening paragraph. It may save some questions

and answers that I will consume our time later in the afternoon. I read:

Mr. Chairman, the amounts asked for in this bill, H. R. 204, are for the purpose of completing obligations incurred by the War Department during the process of acquiring real estate upon which the various barracks are located. In some instances the property was under contract. In others, it would be requisitioned at the time of the passage of the act of July 11, 1919, which prevented any further moneys being expended for the purchase of real estate by the War Department. In all cases the War Department is definitely obligated for the amount, and this bill in no way contemplates the purchase of any additional real estate, but is solely based on the idea of completing obligations already made and protecting the large investments on the various sites involved."

(Congressional Rec. June 30, 1921, p. 3416.)

"Mr. McKenzie: I will say that during the war we had what is known as a real estate division in the War Department that undertook to purchase these various tracts of land. If you want to interrogate me as to my opinion on the wisdom of some of the transactions carried on by these gentlemen, that is one thing; but if you want to interrogate me on my reasons for supporting the bill, it is that the representatives of the Government pledged the word of the Government to the citizens of this Government to do a certain thing. We are bound by that contract, and therefore, while it may hurt and while it may not have met with my approval originally, I believe we should do no other thing than to say we are bound in an honorable way to carry out the contract made with the citizens by the representatives of the Government. (Applause)."

(Congressional Rec. June 30, 1921, p. 3417.)

"Mr. McKenzie: I will say that I do not understand that a citizen of the United States who has entered into a contract with representatives of the Government of the United States for a certain sum of money for certain

property conveyed to the United States, and which he has abandoned to the Government, which has taken possession of it, should be compelled to go into the Court of Claims, or even wait three years for payment, as they have had to do in this case. I think it is a clear case of delay on the part of the Government in carrying out a contract which apparently the War Department has been prevented from doing on account of Congress permitting them to do so."

"Mr. Greene of Vermont: The present policy of this Government is not involved here. We are here trying to pay people a contractual obligation which was made in war time, which is now pending on an old policy that is a legacy from the last administration."

"Mr. Greene, of Vermont: These are real estate contracts which were in process of completion when the House suddenly cut off the payment of any money, it made no difference whether the contract was good, bad, or indifferent. These particular instances come here and the situation is such that if they are not closed up, all of the former owners or occupiers of this land are to be put to years more of distress, because they are in dispossession. There is no controversy about the amount to be turned over. The money was once appropriated for by this Congress, and it is in the Treasury now. We are asking that that appropriation be now released so that it can be applied to its original purpose."

(Congressional Rec. July 1, 1921, p. 3459.)

"Mr. Sanders of Indiana: There is a provision in the Constitution of the United States which reads as follows:

Nor shall any private property be taken for public use without just compensation.

The Government of the United States, under the authority of an act passed by this Congress, has entered into solemn contractual obligations with citizens of the United States for their private property, for use for war purposes. On that private property they have erected

valuable improvements, running out into millions upon millions of dollars. In other cases, under the authority of laws passed by this Congress, condemnation proceedings have been instituted, and they have reached the point where it is necessary for the appropriations to be authorized.

Now, can it be justly contended that when our Constitution provides that just compensation must be paid in the event we take over property, is it to be contended that these private citizens whose property we have in our possession, in our use, and which we intend to keep, must be compelled, in addition to the litigation in the condemnation proceedings, in addition to bringing about these contracts, to go into the Court of Claims and establish their claims there? The Court of Claims was not established for that purpose. It was established for the disposal of unliquidated claims against the Government which necessitate litigation. Whenever a solemn contract fixes the amount, you need no litigation, and all you need is an appropriation by the Congress. When you have a condemnation proceeding, when you have an adjudication by that tribunal, you need no Court of Claims. All you need is an appropriation of the amount fixed."

(Congressional Rec. July 1, 1921, p. 3461.)

"While this bill does carry appropriations amounting to four millions and a few hundred thousand dollars, if it passes it will enable the War Department to get rid of a lot of this property, andput back into the Federal Treasury much more than $4,000,000. As it is today, the department is helpless in the matter. It can not move. In several instances it has these buildings on land which it does not own. In the projects named this bill permits the War Department to complete title, as it were, to the remaining parcels, and in that way enable it to do business with people who will come forward, and have already come forward, in some instances, with proposals to purchase."

"Mr. Wadsworth: Of course, it is fair to say that those improvements were put on at war-time prices, but even making allowance for the reduction in their value, it is easy to see that the improvements are worth infi-

nitely more than the land. The improvements are useless to the Government, in the matter of getting rid of them or using them actively on a permanent basis until the Government owns the land under them. I think the War Department is not entirely out of sympathy with my view and that of the Military Affairs Committee of the Senate, and if I had my way about it, as soon as I got title to the entire tracts of land which underlie these great installations I would sell most of them and stop maintaining them and adding to the overhead cost of the Army."

(Congressional Rec. December 22, 1921, p. 768.)

"Mr. Nelson: What I mean is whether the figures that are given here are the result of condemnation proceedings, or are they the result of agreements with the owners?

Mr. Wadsworth: Both.

Mr. Nelson: Are there any of them as to which no agreements have been made and no condemnation proceedings had?

Mr. Wadsworth: Yes; there is one, and I was going to ask that that be stricken from the bill.

Mr. Nelson: Which one is that?

Mr. Wadsworth: It is the one relating to the quartermaster's warehouse at Baltimore, Md., that provision which authorizes the Secretary to sell to the Canton Co. of Baltimore, for $300,000 the improvements erected upon the site. I am going to ask that that be stricken from the bill. The Secretary informs me that he is now in negotiation with the owners of the land to get them to purchase the Government buildings, and he will be in position to get a better deal than that provided for by the House provision, and he wants that stricken from the bill. The Military Committee authorized me to offer that amendment."

(Congressional Rec. December 22, 1921, pp. 769, 770.)

"Mr. Jones, of Washington: Does the Senator really think we would make money by investing more money, in order to get title to the land which has the

buildings on it if the buildings are not suitable for use by the private parties?

Mr. Wadsworth: Oh, decidedly; yes.

Mr. Jones, of Washington: That has been very carefully looked into by the committee?

Mr. Wadsworth: Yes; it has been very carefully looked into by the committee."

(Congressional Rec. December 22, 1921, p. 771.)

"The bill is designed to enable the War Department to clean up the title to various pieces of real estate upon which the Government now owns very valuable buildings. The projects are listed in the bill, and the amount of money necessary to acquire title to the remaining small parcels or tracts of real estate is set forth in connection with each project. As a matter of fact, while the bill proposed to appropriate $4,000,000, it will put the Government in a position where it can save large amounts of money in the future, either by selling these properties, in which the Government has invested such immense sums, or, in some instances, by leasing them to industrial concerns."

"Mr. King: Is it the intention of the Government to keep all the buildings that have been erected upon the tracts referred to in the bill?

Mr. Wadsworth: I should hope that it was the intention of the Government to sell most of these places, but they can not do so until they own finally the parcels of land underneath the buildings.

Mr. King: Does the testimony indicate that the Government will recoup much more than this bill carries?

Mr. Wadsworth: Yes; it indicates that it will recoup much more.

Mr. King: The committee are unanimous in the view that the $4,000,000 proposed to be appropriated should be expended?

Mr. Wadsworth: Yes; in order to save a much larger sum, in the discretion of Congress, later on."

(Congressional Rec. February 17, 1922, p. 3007.)

"Mr. Wadsworth: It frees the hands of the Govern-

ment. There is over $130,000,000 invested by the Government in permanent construction in these projects. If we will spend $4,000,000 now, we will get title to the last parcel that underlies those buildings. Then we can do what we please with them. Until we get title, our hands are tied."

(Congressional Rec. February 17, 1922, p. 3008.)

"Mr. King: Mr. President, may I inquire of the Senator whether it would not be wiser to carry the appropriation in the military bill? I want the military part of the Government to be charged with everything that is legitimately chargeable to the Army and to the Navy. As far as I am concerned, I do not want expenses for the Army or for the Navy to be charged in some othere category on the books of the Government."

(Congressional Rec. February 17, 1922, p. 3009.)

17. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the Acts of March 8, 1922, and July 1, 1922, precluded the plaintiff in error from showing that the real purpose of Congress was not to take the property of the plaintiff in error for a public use, but for a private use or purpose, namely, to enable the United States of America to sell or lease the improvements it had placed upon the land.

18. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that "public use" and "public benefit" are synonymous terms, and that the condemnation of plaintiff in error's property was justified, though the sole purpose of the United States in instituting such condemnation proceeding was to acquire title to said land so that same might be sold or leased to private interests, and thus salvage the moneys expended in improvements on said land by the United States.

R. G. BICKFORD,
THOMAS H. WILLCOX,
J. WINSTON READ,
Newport News, Va.
Attorneys for Plaintiff in Error.

PRAYER FOR REVERSAL.

Filed April 9, 1924.

And now comes the Old Dominion Land Company, a corporation, plaintiff in error, and prays for a reversal of the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, in an action brought by the United States of America against the Old Dominion Land Company, a corporation, which judgment was entered in the Office of the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit on the 9th day of February, 1924; and it also prays for a reversal of the judgment in said action of the District Court of the United States for the Eastern District of Virginia, entered in the Office of the Clerk of said Court at Norfolk, Virginia, on the 21st day of May, 1923.

R. G. BICKFORD,
THOMAS H. WILLCOX,
J. WINSTON READ,
Attorneys for the Old Dominion
Land Company, a Corporation.

WRIT OF ERROR.

Issued April 9, 1924.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said Circuit Court of Appeals, before you, at the February, 1924, term thereof, between the Old Dominion Land Company, a corporation, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said

plaintiff in error, the Old Dominion Land Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 9th day of April, in the year of our Lord, one thousand nine hundred and twenty-four.

(Seal)

CLAUDE M. DEAN,
Clerk of the United States Circuit
Court of Appeals, Fourth Circuit.

Allowed by

JOHN C. ROSE,
United States Circuit Judge.

SEVICE OF WRIT OF ERROR.

The foregoing writ of error is served by lodging a copy thereof for the adverse party, on the 9th day of April, 1924, in the Clerk's Office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, where the record remains.

Attest: CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

BOND.

Filed April 9, 1924.

Old Dominion Land Company, Plaintiff in Error,
vs.
United States of America, Defendants in Error.

Know all men by these presents, that we, Old Dominion Land Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety (the said Surety Company being authorized to do business in the State of Virginia), are held and firmly bound unto the United States of America in the just and full sum of ONE THOUSAND DOLLARS ($1,000.00), for the payment of which well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly, severally, and firmly by these presents.

In testimony whereof, the said Old Dominion Land Company and United States Fidelity and Guaranty Company have caused these presents to be signed and their corporate seals hereunto affixed by their duly authorized officers, this 9th day of April, 1924.

Whereas, the above-named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-styled cause by the United States Circuit Court of Appeals for the Fourth Circuit.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

OLD DOMINION LAUD COMPANY,
By W. B. LIVEZEY, President.

(Seal of Old Dominion Land Co.)

Attest:

MALCOLM NEXSEN,
Assistant Secretary.

UNITED STATES FIDELITY &
GUARANTY COMPANY.
By C. R. HASKINS, Its attorney in fact.

(Seal of Surety)

Endorsed: "Approved April 9, 1924.

JOHN C. ROSE,
U. S. Circuit Judge."

CITATION.

Issued April 9, 1924.

UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and adminished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein the Old Dominion Land Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Rose, Circuit Judge, this 9th day of April, in the year of our Lord one thousand nine hundred and twenty-four.

JOHN C. ROSE,
Circuit Judge.

SERVICE OF CITATION.

Service accepted.

PAUL W. KEAR,
United States Attorney.

April 14, 1924.

STIPULATION AS TO CONTENTS OF RECORD.

Filed April 28, 1924.

(Title Omitted.)

It is stipulated by the parties hereto that in making up the record for the United States Supreme Court, the Clerk will include the following:

The transcript of record as printed for use in the United States Circuit Court of Appeals for the Fourth Circuit.

All the proceedings in the United States Circuit Court of Appeals for the Fourth Circuit, including:

The Opinion of said Court.
The Judgment of said Court.
The Petition for writ of error from the Supreme Court of the United States.
The Assignment of Errors.
The Prayer for Reversal.
The Writ of Error.
The Bond on Writ of Error.
The Citation.
This Stipulation.

R. G. BICKFORD,
THOMAS H. WILLCOX,
J. WINSTON READ,
Attorneys for Plaintiff in Error.
PAUL W. KEAR,
United States District Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 29th day of April, A. D., 1924.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

Office Supreme Court, U. S.
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CLERK

No. [redacted]55

Supreme Court of the United States

OLD DOMINION LAND COMPANY,
PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

R. G. BICKFORD,
J. WINSTON READ,
THOMAS H. WILLCOX,
Attorneys for Plaintiff in Error.

Appeals Press, Inc., Richmond, Va.

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Supreme Court of the United States

OLD DOMINION LAND COMPANY,
PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

(References are to top paging of the printed record)

STATEMENT OF THE CASE

This is a proceeding which was begun on behalf of the United States of America in the District Court of the United States for the Eastern District of Virginia at Nor-

folk, to acquire by condemnation the title to certain property of the Old Dominion Land Company situated in the City of Newport News and County of Warwick, Virginia.

The proceeding was begun by the Attorney-General, acting under the direction of the Secretary of War, as is shown by his letter of July 21, 1922. (Rec. p. 7).

The lands sought to be condemned were for many years prior to the war, and at all times since, owned by the plaintiff in error, Old Dominion Land Company. The only right the United States has ever had, or has ever, prior to condemnation, pretended to have in these lands was under certain leases dated July 1, 1918, and various renewals of said leases, the last of which said renewals expired with the 30th day of June, 1922. (Rec. pp. 8, 62).

The War Department had originally leased these lands from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom, within thirty (30) days from the expiration of the lease, the improvements placed thereon during the term of the said lease. During the term of said lease, certain warehouses were placed thereon by the United States, and these had not been removed from the premises within the period prescribed by the lease. (Rec. p. 62).

The Government claims that the condemnation proceedings were authorized by the Act of March 8, 1922. The following excerpt from the Act indicated the terms and conditions to the exercise of the right to take over the lands:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the Army Appropriation Act, approved July 11, 1919, making unavailable, with certain exceptions, appropriations for the support of the Army and the Military Estab-

lishment for the purchase of real estate, as amended by the Act approved February 28, 1920 (Public Numbered 151, Sixty-sixth Congress), be, and the same are hereby, further amended so *as to authorize completion of the acquisition of the real estate hereinafter specified in respect whereof requisition notices had been served or given before July* 11, 1919, *under section* 10 *of the Act approved August* 10, 1917 (*Fortieth Statutes at Large, page* 276), *or in respect whereof agreements had been made for purchase thereof, or proceedings begun for condemnation thereof.*"

The land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, nor any judicial or administrative award made with respect thereto at any time. (Rec. p. 62).

According to the contention of plaintiff in error, one or more of these conditions must exist before this proceeding can be maintained under the Acts of Congress of March 8, 1922, or July 1, 1922.

1. The original petition of the United States relied on the Acts of Congress of August 1, 1888, March 8, 1922, and July 1, 1922, to justify the condemnation. The petition alleged, among other things, that the land therein described was needed by petitioners for a site for quartermaster warehouses for the use of naval and military forces, and/or inland or port storage and shipping facilities and for other purposes, and for public buildings desired by the United States of America, but did not allege the existence of any

of the conditions imposed by the statute on the right to purchase.

The defendant, Old Dominion Land Company, moved to dismiss the petition on sundry grounds, (Rec. p. 5) and the court sustained said motion to the extent that the petition failed to show that in the opinion of the Secretary of War, or any other officer of the United States Government, it was necessary or advantageous to the United States that the lands mentioned in the petition should be acquired by condemnation by the United States, but overruled said motion in all other particulars, to which action of the Court the said Old Dominion Land Company duly excepted. Thereupon, on motion of the United States, leave was granted to amend their petition by striking out the words, in the second paragraph, "or naval and" and the words "and for other purposes," and on like motion, leave was granted the petitioners to amend the seventh paragraph of their petition to read as follows:

> "That the Secretary of War has officially determined that it is necessary and advantageous for the petitioners to acquire the lands hereinbefore mentioned and referred to by condemnation proceedings, under judicial process, and has certified that fact to the Attorney-General of the United States, and that these proceedings are instituted by direction of the Attorney-General of the United States, acting in that behalf and in accordance with the request of the Secretary of War, and under the authority of the Acts of Congress aforesaid.
>
> "The petitioners file as a part of said amended petition photostatic copy of a letter of the Secretary of War to the Attorney-General of the United States, dated July 21, 1922, and marked "Exhibit 1-a." (Rec. p. 7).

2. The Old Dominion Land Company moved to dismiss and demurred to said amended petition on sundry grounds set out in writing (Rec. pp. 21, 23), including the grounds

that the allegations of the petition did not set up the conditions precedent mentioned in the Acts of March 8, 1922, and July 1, 1922, which were essential to bring the property sought to be condemned within the terms of said Acts, and further that the Act of March 8, 1922, relied on in the petition, was in violation of the Constitution of the United States, and especially the Fifth Amendment thereto, in that it deprived the owners of the property sought to be condemned of said property without due process of law, and takes private property for public use without just compensation. But the Court overruled said motion to dismiss, and likewise overruled said demurrer, to which rulings of the Court the Old Dominion Land Company duly excepted. (Rec. p. 23).

3. Thereupon the Old Dominion Land Company filed its answer to the petition of the United States alleging, among other things, that the sundry Acts of Congress above mentioned did not authorize the condemnation of its property; that the Act of March 8, 1922, was unconstitutional in providing that any addition to the value of the premises, resulting from the improvements thereto, or in the vicinity thereof, made by, or at the expense of the United States, should be excluded from the sum paid to, or recovered by the owners; that the said land was no longer required for military purposes, or other public use, and that the sole object of the condemnation proceedings was to acquire title to the land in order that the same might be sold or leased by the United States to commercial interests; and setting up sundry other defenses, reference being made to said answer for a specification of the same. (Rec. p. 25).

4. At the trial of the case the United States of America introduced no evidence (save on the question of damages),

but relied entirely on the Acts of Congress aforesaid, and took the position that the Acts of Congress aforesaid were conclusive upon the Court.

Thereupon the Old Dominion Land Company proved the following facts: That the War Department had leased the land sought to be condemned in these proceedings from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom, within thirty days after the expiration of the lease, the improvements placed thereon by the lessee during the term of said lease; that during the term of said lease certain warehouses were placed thereon by the petitioners; and that these had not been removed from the premises within the period prescribed by the lease. The defendant proved that the land sought to be acquired was not real estate in respect whereof requsition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, unless the letter of Secretary of War Baker filed with petition as amended constitutes the beginning of such proceedings; nor any judicial or administrative award made with respect thereto at any time; that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department acting for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had been referred by Congress for consideration and report, which bill was subsequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act," etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment

in the buildings on said property and that the amounts asked for was for the purpose of completing obligations incurred by the War Department during the process of acquiring the real estate upon which the buildings were located, and made such other statements and representations as caused the House Committee to make a certain report to the House of Representatives, being Mr. McKenzie's report No. 183, marked "Exhibit A" in the record, and likewise a report to be made by the Senate Committee on Military Affairs, to the Senate, being Mr. Wadsworth's report No. 215, marked "Exhibit B" in the record. (Rec. p. 62).

And defendant further proved prior to the institution of these proceedings that the War Department had been engaged in negotiations for the sale of the warehouses on the said land to various parties; and that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of the said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, Mayor of Newport News, Virginia, that the said warehouses were surplus property and were not needed by the Government; and on the 18th day of July, 1922, caused to be executed by the Assistant Secretary of War a contract for the least of the same to Edward W. Wolcott, a citizen of the City of Norfolk, Virginia, who was in no wise connected with the United States Government. (Rec. p. 63).

The District Court, however, refused to consider any of the facts proved by the defendant, and held that the Acts of Congress dated March 8, 1922, and July 1, 1922, authorized this condemnation proceeding and were conclusive upon the Court, to which ruling the Old Dominion Land Company duly excepted. (Rec. p. 65).

Thereupon the jury, after having heard the charge of the Court, returned their verdict, awarding the Old Dominion Land Company the sum of ONE HUNDRED AND TWEN-

TY-NINE THOUSAND, SEVEN HUNDRED DOLLARS ($129,700.00) as the value of said land. The charge of the Court expressly excluded the value of the improvements placed on the land by the United States of America, to which portion of the charge the Old Dominion Land Company duly excepted. (Rec. p. 88).

Judgment was then entered by the Court on the verdict of the jury.

A motion for a new trial was made by the defendant and overruled, to which ruling the said defendant excepted.

5. The case was taken by writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which Court affirmed the judgment of the District Court.

In said Circuit Court of Appeals your petitioner argued the various questions raised before the District Court on motion to dismiss, demurrer, and answer, but all of said questions were decided adversely to petitioner's contention.

QUESTIONS INVOLVED.

The questions involved are:

1. Whether the letter of the Secretary of War addressed to the Attorney-General under date of July 21, 1922, and filed with the amended petition in this case, shows that in the opinion of said Secretary of War it was necessary or advantageous to the United States Government to acquire by condemnation, the property of plaintiff in error for public use. (Rec. p. 7).

2. Whether the Acts of Congress of March 8, 1922, and July 1, 1922, or either of them, authorize the taking of plaintiff in error's property in this condemnation proceeding. (Rec. p. 30).

3. Whether the Act of March 8, 1922, is in violation of the Constitution of the United States, and especially the Fifth Amendment thereto in that said Act provides:

> (a) That in event of a judicial or administrative award approved by the Secretary of War "any addition to the value of the premises resulting from the improvements thereto, or in the vicinity thereof made by, or at the expense of the United States, shall be excluded from the sum paid to or recovered by the owners," and
>
> (b) In event the Secretary of War causes a condemnation proceeding to be instituted for the acquisition of the title, "any addition to the value of the premises resulting from improvements thereto, or in the vicinity thereof, made by, or at the expense of the United States, shall not be included in the award to the owners." (Rec. p. 24).

4. Whether reports of the House and Senate Committees, as well as explanatory statements of the committee member in charge of the bills made in the course of passage of the above mentioned Acts, are admissible to show the legislative intent. (Rec. pp. 66, 76).

And if admissible, whether such reports and statements do not show that it was not the intention of Congress, by the passage of these Acts, to authorize the condemnation of plaintiff in error's property for a public use.

5. Whether the lands sought to be condemned in this case are taken by the United States for the public use, or simply for the public benefit, to protect the Government's interests in certain expenditures made, or improvements placed

on said lands, and whether "public use" and "public benefit" are synonymous terms. (Rec. p. 32.)

6. Whether the facts proved by the plaintiff, as set out in bill of exceptions No. 3, which showed that said lands were not sought or taken for the public use, should have been considered by the District Court and Circuit Court of Appeals. (Rec. p. 62).

7. Whether any provision in the Acts of Congress of March 8, 1922, or July 1, 1922, precluded the plaintiff in error from showing that the purpose of Congress was not to take the property of the plaintiff in error for a public use, but for a private use or purpose, namely, to enable the United States of America to sell or lease said land to private interests. (Rec. p. 65).

8. Whether the plaintiff in error is entitled to compensation for the value of the buildings erected on the leased premises and not removed within the time provided in the lease. (Rec. p. 88).

MANNER IN WHICH QUESTIONS WERE RAISED.

The sundry questions above set out, were raised by motion to dismiss, demurrer and answer.

ASSIGNMENT OF ERRORS.

Plaintiff in error submits that in the record and proceedings and the judgments rendered in the District Court

and the Circuit Court of Appeals for the Fourth Circuit, there is manifest error in this, to-wit:

1. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the petition of the plaintiffs. (Rec. pp. 5-6).

2. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's demurrer to the amended petition. (Rec. pp. 23, 48).

3. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the amended petition. (Rec. p. 58).

4. The District Court of the United States for the Eastern District of Virginia, erred in overruling the defendant's motion to dismiss the plaintiff's amended petition because of the variance between its allegations and the letter from the Secretary of War to the Attorney-General. (Rec. p. 59).

5. The District Court of the United States for the Eastern District of Virginia, erred in declining to consider any of the facts proved by the defendant upon its motion to dismiss the plaintiff's petition, and in overruling said motion to dismiss. (R. p. 62).

6. The District Court of the United States for the Eastern District of Virginia, erred in refusing to charge the jury that the defendant was entitled to have the improvements placed upon the property during the terms of the lease and not removed therefrom within thirty days after the expiration thereof considered by the jury in estimating the value of the property sought to be condemned in these

proceedings, and in charging the jury that the defendant was not entitled to have the value of such improvements so considered by the jury. (Rec. p. 87).

7. The District Court of the United States for the Eastern District of Virginia, erred in refusing to set aside the verdict of the jury and grant the defendant a new trial. (Rec. p. 94).

8. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the petition of the plaintiffs. (Rec. pp. 5, 6).

9. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's demurrer to the amended petition. (Rec. pp. 23, 48).

10. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the amended petition. (Rec. p. 58).

11. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in overruling the defendant's motion to dismiss the plaintiff's amended petition because of the variance between its allegations and the letter from the Secretary of War to the Attorney-General. (Rec. p. 59).

12. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the ruling of the said District Court in declining to consider any of the facts proved by the defendant upon its motion to dismiss the

plaintiff's petition, and in overruling the said motion to dismiss, which facts are set out in Bill of Exception No. 3, and found on top paging 62 to 86, inclusive, of the printed record, and are as follows:

"BE IT REMEMBERED that on the trial of this cause, the petitioners proved that the War Department had leased the land sought to be condemned in these proceedings from the Old Dominion Land Company on the 1st day of July, 1918, for a term, with the right to remove therefrom within thirty days after the expiration of the lease, the improvements placed thereon by the lessee during the term of said lease; that during the term of said lease certain warehouses were placed thereon by the petitioners; and that these had not been removed from the premises within the period prescribed by the lease. The defendant proved that the land sought to be acquired was not real estate in respect whereof requisition notices had been served or given before July 11, 1919, nor in respect whereof agreement had been made for the purchase thereof, nor proceedings begun for the condemnation thereof, unless the letter of Secretary of War Baker filed with petition as amended constitutes the beginning of such proceedings; nor any judicial or administrative award made with respect thereto at any time; that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department, acting for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had

been referred by Congress for consideration and report, which bill was subsequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act," etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment in the buildings on said property and that the amounts asked for was for the purpose of completing obligations incurred by the War Department during the process of acquiring the real estate upon which the buildings were located, and made such other statements and representations as caused the House Committee on Military Affairs to Report to the House of Representatives as per copy of report hereto attached Marked Exhibit 'A' (Mr. McKenzie's Report No. 183), and which caused a report to be made to the Senate by the Senate Committee of Military Affairs, as per copy of report hereto attached marked 'Exhibit B' (Mr. Wadsworth Report No. 215);

"And defendant further proved prior to the institution of these proceedings that the War Department had been engaged in negotiations for the sale of the warehouses on the said land to various parties; and that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of the said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, Mayor of Newport News, Va., that the said warehouses were surplus property and were not needed by the Government; and on the 18th day of July, 1922, caused to be executed by the Assistant Secretary of War a contract for the lease

of the same to Edward W. Wolcott, a citizen of the City of Norfolk, Va., who was in no wise connected with the United States Government, which lease is in the following words and figures:

'REVOCABLE RELEASE.'

'THIS LEASE made between the Secretary of War, of the first part, and EDWARD W. WOLCOTT, Attorney, of Norfolk, Virginia, of the second part, WITNESSETH: That the Secretary of War by virtue of the authority conferred on him by an Act of Congress approved July 28, 1892 (27 Stat. 321), entitled an Act authorizing the Secretary of War to lease public property in certain cases,' and in consideration of the monthly rental of $1,500.00 payable in advance on or before the fifth day of each month, the first payment to be made at the time of delivery of this lease to the lessee, hereby leases to the party of the second part, hereinafter designated as the lessee, for six months, commencing August 1, 1922, but revocable at will by the Secretary of War, the following described premises and property located at Newport News, Virginia:

All that land and buildings known and described as twenty-one warehouses, comprising groups 2 and 3, with the exception of the two now temporarily used by the Newport News Shipbuilding and Dry Dock Company, together with such machinery and equipment as are incident thereto, and the use of the railroad tracks necessary for the proper use of the warehouses under this lease.

It is provided that the above mentioned land, buildings, machinery, equipment, and railroad tracks shall be kept in good condition, order and repair, ordinary wear and tear excepted, and returned to the lessor at the expiration or revocation of this lease. It is understood by the lessee that the United States Government does not have title to the land on which the within warehouses stand, and that this lease is granted subject to such action as the owners of the real estate might legally take. It is further understood that this lease is to be operative and binding to the lessee only in the event that it is possible to have the same bonded by the United States Government, so as to make them bonded warehouses.

And the lessee hereby covenants to pay to the United States the monthly rental above reserved on the dates above mentioned; that this lease shall be revocable at will by the Secretary of War; and to pay to the United States on demand any sum which may have to be expended after the expiration or revocation of this lease in putting the said premises or property in as good condition for use by the United States as it is at the date of the execution of this lease.

And it is still further agreed that after the expiration or revocation of this lease the lessee shall remove any construction or other property which it may have on said premises, within such time as the Secretary of War may indicate; and upon its refusal, neglect, or inability to remove the same, the

Secretary of War may cause them to be removed at the expense of the lessee and no claim for damages against the United States, or any agent thereof, shall be credited by or made on account of such removal.

WITNESS my hand and seal of the War Department this 18th day July, 1922.

(Signed) J. M. WAINWRIGHT,
The Assistant Secretary of War.

(Seal)

THIS LEASE is also executed by the Lessee this

..... day of ....., 1922.

....., Attorney.

Signed and sealed in the presence of

.....

.....

The said lease was never actually executed by the said E. W. Wolcott.

And the petitioners proved that the Judge Advocate General of the War Department advised the Secretary of War that such contract was not legal at that time;

WHEREUPON the defendant, by counsel, upon the facts so proven requested the Court to dismiss these proceedings;

But the petitioners, by their counsel, objected to the consideration of the facts proved by the defendant, which motion the Court sustained upon the ground that the Act of Congress dated March 8, 1922, and July 1, 1922, respec-

tively, were conclusive upon the Court, as set out in its opinion.

To which action of the Court, the defendant, by its counsel, excepted, and tenders this its bill of exception number 3, which it prays may be signed, sealed and made a part of the record, which is accordingly done this the 11th day of July, 1923, and within the time prescribed by law.

D. LAWRENCE GRONER, (Seal)
U. S. Judge.

EXHIBIT "A" (Rec. p. 66)
House of Representatives.

67th Congress
1st Session

Report
No. 183

AMENDMENT OF ARMY APPROPRIATION ACT APPROVED JULY 11, 1919.

June 16, 1921,—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. McKenzie, from the Committee on Military Affairs, submitted the following:

REPORT.

(To accompany H. R. 7158.)

The Committee on Military Affairs, to whom was referred the bill (H. R. 7158) to amend the Army Appropriation Act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases, and making additional appropriations therefor, having consid-

ered the same, report thereon with a recommendation that it do pass.

The members of the committee, realizing the importance of this bill and being desirous of giving the House such information as will enable the Members of Congress to understand fully the purposes of the same, have undertaken to set forth in some detail the laws under which the obligations were incurred by the Government, together with a brief statement covering the location, extent, value, and use of the several tracts involved, as follows:

During the war it became necessary to acquire various tracts of land for use by the military forces of the country in the pursuit of its operations. Under the laws then existing it was difficult and almost impossible to gain immediate possession of the property required. Thus, after having been presented to Congress, emergency legislation was enacted which authorized the President to take over forthwith such properties as were deemed essential to the prosecution of the war. This law, known as the food and fuel act, was enacted August 10, 1917, and reads in part, as follows:

(Act of Congress approved August 10, 1917, (40 Stat., 276, 279), being an act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.)

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for

such supplies, and she shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies: PROVIDED, That nothing in this section or in the section that follows shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation or association be required to furnish to the Government any seed necessary for the seeding of the land owned, leased, or cultivated by them.

Under this authority many of the activities under control of the War Department were requisitioned in order that immediate possession might be taken of the property, and the matter of examining title and completing payment was delayed until a future time. At that time Congress had made sufficient appropriation to cover all of the projects necessary in the prosecution of the war with the Central Powers. Such appropriations as had been made were available for the completion of all projects begun and the payment of awards made by those agencies of the War Dement constituted for the purpose of hearing disputes as to land values, etc., until the enactment of the Army appro-

priation bill for 1920, which was approved July 11, 1919, and which carried an amendment reading as follows:

> * * * (Restrictions in the use of appropriations.) That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate for the construction of Army camps or cantonments, except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necessary in order to protect the interests of the Government.
>
> The above provision therefore prohibited the completion of any contracts for the purchase of real estate, or payment of any awards which may have been made in the acqusition thereof.
>
> H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above mentioned restrictive act, and in each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the department. These projects are as follows:

* * * * *

For the Quartermaster Warehouses, Newport News, Va., $223,670.

Location: Newport News, Va.

Acreage: 41.35.

When acquired: Occupied by lease in 1917 or early part of 1918, at rental of $3,588.48 per annum.

Improvements: Group of semi-permanent warehouses (concrete floors, frame superstructure, and brick fire walls), with railroad trackage, concrete roadways, water supply, etc.

Storage space: 420,000 square feet under cover.

Investment: Land, nothing yet paid; $223,670 estimated as necessary to acquire. Improvements, $1,995,000; total investment, $2,218,670.

The total amount authorized to be appropriated in this bill is $4,140,105.72, which is for the completion of the purchase of the real estate upon which the United States has erected improvements, the value of which is $131,589,131. It is therefore apparent that it is decidedly to the interest of the United States to complete these projects in order to protect the large investment involved.

In conclusion, we feel it proper to state that the purpose of this legislation is to enable the War Department to perfect the title to the various tracts of real estate mentioned in the bill, and upon practically all of which extensive improvements have been made.

Whether the original acquisition of all of this real estate was wise or in the interest of the Government is no longer a debatable question. Under the laws enacted by Congress the power to acquire was exercised and the possession taken from the owners by the agents of the Government who have up to

this time been waiting for the settlement of their claims, but being denied on the ground that the limitation placed by Congress in the Army appropriation act approved July 11, 1919, prevents payment.

It may be that all of these tracts of land will not be necessary for the military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saying anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government.

EXHIBIT "B." (Rec. p. 76).

Calendar No. 227.

67 Congress, 1st Session. SENATE Report No. 215.

AMENDMENT OF ARMY APPROPRIATION ACT APPROVED JULY 11, 1919.

July 8, 1921—Ordered to be printed.

Mr. Wadsworth, from the Committee on Military Affairs, submitted the following:

REPORT.

(To accompany H. R. 7158.)

This report of the Senate Committee, No. 215, is identical in all respects with the foregoing Report of the House Committee, No. 183, and will, therefore, not be copied at length herein. It is found on pages 76 to 86, inclusive, of the printed record.

13. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the action of the District Court in refusing to give the following prayer or instruction at the request of the defendant, the Old Dominion Land Company: (Rec. p. 87).

> "The Court instructs the jury that in determining what would be just compensation in the case at bar, the jury, in addition to the value of the land plus interest, will add thereto the value of the warehouses erected by the petitioner on said land."

14. The United States Circuit Court of Appeals for the Fourth Circuit erred in sustaining the action of the District Court in charging the jury as follows: (Rec. p. 88).

> "The Court charges you, gentlemen of the jury, that your duty in this case is to ascertain what will be just compensation to the defendant for the land (exclusive of the buildings and improvements thereon) to be taken by the Government for its purposes, in this proceeding, that is to say, what will be a fair equivalent to pay for what is taken and in determing this question you shall be governed by the fair market value of the land, as well for its present purposes as for those for which it may be reasonably adopted at this time or in the immediate future. You shall take into consideration the facts and circum-

stances of its location; the demand, if any, for the property of the kind; its liability in the near future to increase or decrease in value; and in short, anything shown you by the evidence tending to bear on its present market value. and by 'market value' is meant the price which a purchaser who desires to buy, but is not compelled to buy, would be willing to pay, and which an owner who desires to sell, but is not compelled to sell, would be willing to accept.

"And the Court further charges the jury that in determining what will be just compensation to the defendant for the lands in question that the jury are not to take into consideration or allow anything to the defendant for the buildings and improvements placed upon the three tracts of land in question by the United States of America.

"The Court further charges the jury that in determining what is just compensation for the defendant's interest in the lands in question that they should deduct from the value of said three tracts of land respectively, what the jury believe from the evidence is a fair allowance for the said right of way conveyed by the defendant, Old Dominion Land Company, to the Newport News Light and Water Company."

15. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the Acts of Congress of March 8, 1922, and July 1, 1922, authorized the taking of planitiff in error's property in this condemnation proceeding. (Rec. p. 102).

16. The United States Circuit Court of Appeals for the Fourth Circuit erred in construing the said Acts of Con-

gress in not considering the reports of the House and Senate Committees, as well as Congressional discussion which led to the passage of the Act of March 8, 1922. The said reports will be found on pages 66-86, inclusive, of the printed record.

In submitting the said reports Mr. McKenzie, of the House Committee, and Senator Wadsworth, of the Senate Committee, used the same language, which is in part as follows:

> "H. R. 7158 is presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above mentioned restrictive act (Act of July 11, 1919), and in each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the department."
>
> * * * * *
>
> "It may be that all of these tracts of land will not be necessary for the Military establishment in peace times, and that some of them may be transferred to other activities of the Government or sold to private interests, but it is absolutely imperative for the protection of the Government, and the millions of dollars expended in the improvements on these properties, that this legislation be enacted, enabling the Government to protect the title to the same, not saying anything in behalf of the citizens who have waited long and patiently for settlement of their claim, and who unquestionably are entitled to fair treatment at the hands of the Government."
>
> (Rec. pp. 68, 76, 79, 86).

The Congressional discussion which led to the passage of the Act of March 8, 1922, and which is relied on by the plaintiff in error, is as follows: (Rec. pp. 124-131, inc.)

> "By Mr. Kahn: A bill (H. R. 7158) to amend the Army appropriation act, approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases and making additional appropriations therefor; to the Committee on Military Affairs."
>
> (Congressional Rec. June 15, 1921, p. 2701.)

> "Mr. McKenzie, from the Committee on Military Affairs, to which was referred the bill (H. R. 7158) to amend the Army appropriation act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases, and making additional appropriations therefor, reported the same without amendment, accompanied by a report (No. 183), which said bill and report were referred to the Committee of the Whole House on the state of the Union."
>
> (Congressional Rec. June 16, 1921, p. 2761.)

> "The only purpose of this bill is to authorize the appropriation of a sufficient amount of money to cover the balances due on these various projects and to enable the citizens of our own country to get what rightly and justly belongs to them. It is not the purpose of the Committee on Military Affairs at this time to undertake to justify all these projects. In my judgment many of them were unnecessary; many of them, perhaps, were purchased in the heat of conflict and excitement of war, but are of no earthly military use to the Government at this time.

But that is not the question involved. The government has exepnded something like $131,000,000 on these various projects, and we owe a little over $4,000,000 to complete the title. Now, gentlemen, it is a simple business proposition."

"By Mr. Kahn: The War Department stated to the committee that by finishing the purchase of some of these lands it would be an easy matter to sell it to the great advantage of the Government, and by perfecting the title in the way the gentleman from Illinois is explaining the Government will probably get back a good percentage of the money that has already been paid out."

(Congressional Rec. June 30, 1921, p. 3413.)

"Mr. McKenzie: We have spent millions of dollars down there, and if it was a mistake to locate it there, we are not chargeable with that. But the citizens whose lands have been taken are entitled to compensation, and this bill is for that purpose, and the use we can make of that property, if we get it, will have to be hereafter determined. I think it was a mistake to locate there."

(Congressional Rec., June 30, 1921, p. 3415.)

"Mr. Greene, of Vermont: Mr. Chairman, my colleague, the gentleman from Illinois (Mr. McKenzie), who is in charge of this bill, informs me that the opening paragraph of the statement of Brig. Gen. Carson, of the Quartermaster Corps, in the hearings on this bill has not been formally called to your attention, and as I know from experience that it is somewhat inconvenient to get copies of these hearings on rather sudden notice, like this, I ask your indulgence while I read that opening paragraph to you. I do this because it seems to me that

the whole story of the bill, its purpose and its intent, is told in this opening paragraph. It may save some questions and answers that will consume our time later in the afternoon. I read:

"Mr. Chairman, the amounts asked for in this bill, H. R. 204, are for the purpose of completing obligations incurred by the War Department during the process of acquiring real estate upon which the various barracks are located. In some instances the property was under contract. In others, it would be requisitioned at the time of the passage of the act of July 11, 1919, which prevented any further moneys being expended for the purchase of real estate by the War Department. In all cases the War Department is definitely obligated for the amount, and this bill in no way contemplates the purchase of any additional real estate, but is solely based on the idea of completing obligations already made and protecting the large investments on the various sites involved."

(Congressional Rec. June 30, 1921, p. 3416.)

"Mr. McKenzie: I will say that during the war we had what is known as a real estate division in the War Department that undertook to purchase these various tracts of land. If you want to interrogate me as to my opinion on the wisdom of some of the transactions carried on by these gentlemen, that is one thing; but if you want to interrogate me on my reasons for supporting the bill, it is that the representatives of the Government pledged the word of the Government to the citizens of this Government to do a certain thing. We are bound by that contract, and therefore, while it may hurt and while it may not have met with my approval originally, I believe we should do no other

thing than to say we are bound in an honorable way to carry out the contract made with the citizens by the representatives of the Government. (Applause)."

(Congressional Rec., June 30, 1921, p. 3417.)

"Mr. McKenzie: I will say that I do not understand that a citizen of the United States who has entered into a contract with representatives of the Government of the United States for a certain sum of money for certain property conveyed to the United States, and which he has abandoned to the Government, which has taken possession of it, should be compelled to go into the Court of Claims, or even wait three years for payment, as they have had to do in this case. I think it is a clear case of delay on the part of the Government in carrying out a contract which apparently the War Department has been prevented from doing on account of Congress not permitting them to do so."

"Mr. Greene, of Vermont: The present policy of this Government is not involved here. We are here trying to pay people a contractual obligation which was made in war time, which is now pending on an old policy that is a legacy from the last administration."

"Mr. Green, of Vermont: These are real estate contracts which were in process of completion when the House suddenly cut off the payment of any money, it made no difference whether the contract was good, bad or indifferent. These particular instances come here and the situation is such that if they are not closed up, all of the former owners or occupiers of this land are to be put to years more of distress, because they are in dispossession. There

is no controversy about the amount to be turned over. The money was once appropriated by this Congress, and it is in the Treasury now. We are asking that that appropriation be now released so that it can be applied to its original purpose."

(Congressional Rec., July 1, 1921, p. 3459.)

"Mr. Sanders, of Indiana: There is a provision in the Constitution of the United States which reads as follows:

Nor shall any private property be taken for public use without compensation.

The Government of the United States, under the authority of an act passed by this Congress, has entered into solemn contractual obligations with citizens of the United States for their private property, for use of war purposes. On that private property they have erected valuable improvements, running out into millions upon millions of dollars. In other cases, under the authority of laws passed by this Congress, condemnation proceedings have been instituted, and they have reached the point where it is necessary for the appropriations to be authorized.

Now, can it be justly contended that when our Constitution provides that just compensation must be paid in the event we take over property, is it to be contended that these private citizens whose property we have in our possession, in our use, and which we intend to keep, must be compelled, in addition to the litigation in the condemnation proceedings, in addition to bringing about these contracts, to go into the Court of Claims and establish their claims there? The Court of Claims was not established for that

purpose. It was established for the disposal of unliquidated claims against the Government which necessitate litigation. Whenever a solemn contract fixes the amount, you need no litigation, and all you need is an appropriation by the Congress. When you have a condemnation proceeding, when you have an adjudication of that tribunal, you need no Court of Claims. All you need is an appropriation of the amount fixed."

(Congressional Rec. July 1, 1921, p. 3461.)

"While this bill does carry appropriations amounting to four millions and a few hundred thousand dollars, if it passes it will enable the War Department to get rid of a lot of this property, and put back into the Federal Treasury much more than $4,000,000. As it is today, the department is helpless in the matter. It cannot move In several instances it has these buildings on land which it does not own. In the projects named this bill permits the War Department to complete title, as it were, to the remaining parcels, and in that way enable it to do business with people who will come forward, and have already come forward, in some instances, with proposals to purchase."

"Mr. Wadsworth: Of course, it is fair to say that those improvements were put on at war-time prices, but even making allowance for the reduction in their value, it is easy to see that the improvements are worth infinitely more than the land. The improvements are useless to the Government, in the matter of getting rid of them or using them actively on a permanent basis until the Government owns the land under them. I think the War Department is

not entirely out of sympathy with my view and that of the Military Affairs Committee of the Senate, and if I had my way about it, as soon as I got title to the entire tracts of land which underlie these great installations I would sell most of them and stop maintaining them and adding to the overhead cost of the Army."

(Congressional Rec., December 22, 1921, p. 768.)

"Mr. Nelson: What I mean is whether the figures that are given here are the result of condemnation proceedings, or are they the result of agreements with the owners?

Mr. Wadsworth: Both.

Mr. Nelson: Are there any of them as to which no agreements have been made and no condemnation proceedings had?

Mr. Wadsworth: Yes, there is one, and I was going to ask that that be stricken from the bill.

Mr. Nelson: Which one is that?

Mr. Wadsworth: It is the one relating to the quartermaster's warehouse at Baltimore, Md., that provision which authorizes the Secretary to sell to the Canton Co. of Baltimore, for $300,000 the improvements erected upon the site. I am going to ask that that be stricken from the bill. The Secretary informs me that he is now in negotiation with the owners of the land to get them to purchase the Government buildings, and he will be in position to get a better deal than that provided for by the House provision, and he wants that stricken from the bill. The Military Committee authorized me to offer that amendment."

(Congressional Rec., December 22, 1921, pp. 769, 770.)

"Mr. Jones, of Washington: Does the Senator really think we would make money by investing more money, in order to get title to the land which has the buildings on it if the buildings are not suitable for use by the private parties?

Mr. Wadsworth: Oh, decidedly; yes.

Mr. Jones, of Washington: That has been very carefully looked into by the committee?

Mr. Wadsworth: Yes, it has been very carefully looked into by the Committee."

(Congressional Rec., December 22, 1921, p. 771.)

"The bill is designated to enable the War Department to clean up the title to various pieces of real estate upon which the Government now owns very valuable buildings. The projects are listed in the bill, and the amount of money necessary to acquire title to the remaining small pracels or tracts of real estate is set forth in connection with each project. As a matter of fact, while the bill proposed to appropriate $4,000,000, it will put the Government in a position where it can save large amounts of money in the future, either by selling these properties, in which the Government has invested such immense sums, or, in some instances, by leasing them to industrial concerns."

"Mr. King: Is it the intention of the Government to keep all the buildings that have been erected upon the tracts referred to in the bill?

Mr. Wadsworth: I should hope that it was the intention of the Government to sell most of these places, but they cannot do so until they own finally the parcels of land underneath the buildings.

Mr. King: Does the testimony indicate that the Government will recoup much more than this bill carries?

Mr. Wadsworth: Yes, it indicates that it will recoup much more.

Mr. King: The committee are unanimous in the view that the $4,000,000 proposed to be appropriated should be expended?

Mr. Wadsworth: Yes, in order to save a much larger sum, in the discretion of Congress, later on."

(Congressional Rec., February 17, 1922, p. 3007.)

"Mr. Wadsworth: It frees the hands of the Government. There is over $130,000,000 invested by the Government in permanent construction in these projects. If we will spend $4,000,000 now, we will get title to the last parcel that underlies those buildings. Then we can do what we please with them. Until we get title, our hands are tied."

(Congressional Rec., February 17, 1922, p. 3008.)

Mr. King: Mr. President, may I inquire of the Senator whether it would not be wiser to carry the appropriation in the military bill? I want the military part of the Government to be charged with everything that is legitimately chargeable to the Army and to the Navy. As far as I am concerned, I do not want expenses for the Army or for the Navy to be charged in some other category on the books of the Government."

(Congressional Rec., February 17, 1922, p. 3009).

17. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the Acts of March 8, 1922, and July 1, 1922, precluded the plaintiff in error from showing that the real purpose of Congress was not to take the property of the plaintiff in error for a public use, but for a private use or purpose, namely, to enable the United

States of America to sell or lease the improvements it had placed upon the land. (Rec. p. 102).

18. The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that "public use" and "public benefit" are synonymous terms, and that the condemnation of plaintiff in error's property was justified, though the sole purpose of the United States in instituting such condemnation proceeding was to acquire title to said land so that same might be sold or leased to private interests, and thus salvage the moneys expended in improvements on said land by the United States. (Rec. p. 103).

ARGUMENT.

While the assignments of error in this case are apparently numerous, this is due to the fact that many of the questions involved were raised at the beginning of the proceeding, by motion to dismiss and demurrer, and subsequently relied on in the answer and at the hearing. Accordingly, while the plaintiff in error does not waive any of its assignments of error, or its contention that the motion to dismiss and demurrer should have been sustained, many of the assignments of error involve the same legal questions and may properly be discussed together.

One of the first questions raised is covered by the second, third, ninth and tenth assignments of error. (Rec. pp. 112, 113).

1.

Does the letter of the Secretary of War addressed to the Attorney-General under date of July 21, 1922, *and filed with*

the amended petition in this case, show that in the opinion of said Secretary of War it was necessary or advantageous to the United States Government to acquire by condemnation the property of plaintiff in error for public use? (Rec. pp. 7, 48).

The District Court properly held that it was essential for the petition to show that in the opinion of the Secretary of War it was necessary or advantageous to the United States that the lands mentioned in the petition should be acquired by condemnation by the United States. (Rec. p. 6). The terms of the Act of Congress of March 1, 1888, made this plain.

The Government in the effort to cure this omission, filed with its amended petition the aforesaid letter of the Secretary of War.

It is submitted that this letter not only shows a failure to comply with the Act, but also shows that the lands sought to be condemned were not sought or needed by the United States for public use, but simply for the public benefit to protect the Government's interest in certain expenditures made, or improvements placed on said lands. This is apparent from the following language taken from the letter of the Secretary of War to the Attorney-General:

> "During the war the Government selected certain land at Newport News, Virginia, as a site for Quartermaster warehouses.
>
> "Improvements aggregating $1,995,000.00 were placed on the site. Since that time some of the land forming a part of the warehouse site has been re-

linquished and the improvements thereon salvaged. There still remain on the land, now in possession by the Government, improvements representing a cost of $1,522,000.00.

"To protect the Government's interests it is necessary and highly advantageous to acquire title to the lands upon which these improvements are situated." (Rec. p. 7).

This is not such a certification by the Secretary as the Condemnation Statute contemplates. The Secretary's certificate may properly be silent as to the purpose of the taking, but if it indicates that that purpose is not for the "public use" the certificate does not comply with the statutory requirement.

2.

In the next place it is submitted that neither the Acts of Congress of March 8, 1922, *nor July* 1, 1922, *authorize the taking of plaintiff in error's property in this condemnation proceeding.*

This contention is raised in the second, third, ninth, tenth and fifteenth assignments of error. (Rec. pp. 112, 113, 123).

It is earnestly insisted that none of the conditions precedent required by the Act of March 8, 1922, exist in this case.

The land sought to be acquired is not real estate (a) in respect whereof requisition notice had been served or given before July 11, 1919; (b) nor in respect whereof agreement had been made for the purchase thereof; (c) nor proceedings begun for the condemnation thereof; (d) nor any

judicial or administrative award made with respect thereto at any time. One or the other of these conditions must exist before the completion of the acqusition of said real estate was authorized by said Act.

It is certified as a fact in Bill of Exceptions No. 3 (Rec. p. 62), and also appears from the opinion of the Court (Rec. p. 45), that no one of these prerequisites exists in the case at bar.

The Acts of March 8, and July 1, 1922, show on their face that the fundamental purpose was to purchase only what the United States had previously obligated itself to purchase.

The Act of July 1, 1922, in nowise enlarges the scope of the Act of March 8, 1922, and gives no additional authority to Congress. It simply makes appropriation for the purchases, etc., provided for in the Act of March 8, 1922.

The Act of July 11, 1919, indicated that the general policy of Congress was to stop war expenditures. The passage of that Act put an end to the use of war appropriations for the purpose of purchasing property used or occupied in war. Congress realized that the property so used should be restored to the usual channels of business so far as possible, and that the war chest of the Government should not be used for purposes no longer necessary to the war. This act put an end to the efforts which had been made to embark the United States in the real estate business.

The Act of March 8, 1922, proposed to purchase war properties. This was, without explanation, a violation of the Congressional policy of the Act of July, 1919, first above referred to, and the language of the opening clauses of the Act of March was inserted to show that it did not create an exception to the general policy of the Act of July 11, 1919, but was merely a recognition by the Government of obligations in certain cases in the event they existed prior to the

Act of July, 1919, which the government was obliged to carry out. It is reasonable to conclude that without the limitations, which the Government now regards as surplusage, the Act of March 8th would not have passed. The Chairmen of both the Senate and House Committees reported that the Act was "presented for the purpose of permitting the United States to carry out obligations incurred prior to the passage of the above mentioned restrictive act (July, 1919), and in each case it is apparent that the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the Department." (Rec. p. 79).

The Court found that the representations were made by the War Department "as an inducement" to the passage of the Act, and that the report of the Chairman was based upon the representations made at the instance of the Secretary of War to the several committees of Congress (Rec. pp. 62-63).

The reports of the Chairman are inconsistent with the idea that the purchase or the condemnation of the lands specified in the Act should be made unless the United States was obligated to purchase them. A reading of the Act itself shows that its purpose was only to amend the Act of July 11, 1919, so as to permit the purchases in respect of which the United States was obligated. The circumstances under which the Act was enacted, and the representations made as an inducement to its passage, clearly indicate that it was not the intention of the Act to authorize purchases of land which the United States held on lease for an agreed term and in respect to which it owed the duty that every tenant owes to his landlord.

It is true that the Quartermaster Warehouses at Newport News, Virginia, are specifically mentioned in the Act of March 8, 1922, but they are mentioned after the declara-

tion of the scope of the Act has been specifically declared and the mention of the Quartermaster Warehouses at Newport News is preceded by the language: "For the purpose of carrying out the provisions of this section, the following amounts are hereby authorized to be appropriated."

The language immediately preceding the language above quoted shows that the Act is only intended to operate "in respect whereof" the United States has become obligated.

If it be argued that to give the statute the construction urged by the plaintiff in error it would be necessary to read out of the Act the references to the Quartermaster warehouses at Newport News, counsel for the plaintiff in error would say that to give the Act the construction for which they claim would involve no such necessity.

We contend that the right meaning of the Act may be briefly stated as follows:

That if in any of the hereinafter enumerated instances any contract, agreement, award, or condemnation proceedings exist or have been taken, the general policy fixed in the Act of July, 1919, to stop expenditures for property used for military purposes, is waived as to any such enumerated property and the Secretary of War is in that case authorized to purchase the same. This construction would permit all the language of the Act to retain its full meaning and not put the Court to the necessity of excluding language carefully included in the Act in order to forward an intent which is inconsistent with the Act as it stands.

36 Cyc., p. 1128.

Posey v. *Commonwealth*, 123 Va. 55.

3.

It is further insisted that the Act of March 8, 1922, *is in violation of the Constitution of the United States, and*

especially the Fifth Amendment thereto in that said Act provides:

> (a) That in event of a judicial or administrative award approved by the Secretary of War "any addition to the value of the premises resulting from the improvements thereto, or in the vicinity thereof, made by, or at the expense of the United States, shall be excluded from the sum paid to or recovered by the owners," and
>
> (b) In event the Secretary of War causes a condemnation proceeding to be instituted for the acquisition of the title "Any addition to the value of the premises resulting from improvements thereto, or in the vicinity thereof, made by, or at the expense of the United States, shall not be included in the award to the owners." (Rec. pp. 24, 48).

These are most remarkable provisions. They prevent the owner of property from introducing any evidence tending to show the value of improvements placed either on the property sought to be condemned, or in the vicinity thereof, by or at the expense of the United States. Any such addition to the value is expressly excluded by the terms of the Act. A mere statement of this proposition would seem to justify the conclusion that it deprives the owner of his property without due process of law, and takes private property for public use without just compensation.

The Government has expended money throughout the country in general projects for the public good. These have inevitably enhanced values in the vicinity. At Newport News it built the concrete road upon which this prop-

erty abuts, it has partially completed a large reserve water supply the means whereof are adjacent to this property,—the warehouses were erected because of their near proximity to the James River, which has been dredged at Government expense. It erected large and expensive facilities for the unloading of coal(not in connection with the warehouses), but in their vicinity. It extended a street car line for general passenger traffic along the road upon which this property abuts to a point several miles north of the city.

All these were improvements in the vicinity of the land sought to be acquired. They are permanent. All of them resulted in great addition to the value of the land which value had accured to the land several years before the Government sought to acquire it, yet the Act of March 8th prevents this increased value—which is common to all lands in the vicinity, from being proven.

All privately owned lands in the City of Washington derive their additional value from Government expenditures in the vicinity. Will it be contended that if it were attempted to acquire these, that the value so added should be excluded?

The value of land should be fixed as of the date of the proceedings. The location of property and its surroundings must be considered in estimating its value. On several occasions Congress has attempted to exclude items of value from awards to be made in condemnation proceedings. So far as the research of counsel for plaintiff in error extends, the Courts have invariably declared such attempts unconstitutional.

Monongahela Navigation Company v. *United States*, 148 U. S., p. 312.

In re Montgomery, 48 Federal, pp. 901, 902.
In re Manderson, 51 Federal, pp. 501, 503, 504.
See also, *Albert Hanson Lumber Company* v. *United States*, 43 Supreme Court Reporter, pp. 442-444.

The Act under review in the *Monongahela Case* provided:

> "That in estimating the sum to be paid by the United States the franchise of said corporation shall not be considered or estimated."

The Court held that the Act violated the 5th Amendment to the Constitution of the United States.

Monongahela Navigation Company v. *United States*, 148 U. S. 312.

The *Montgomery Case* involved condemnation under the River and Harbor Act of March 3rd, 1891.

The Act after appropriating for certain lands contained the provision:

> "provided further that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter."

The Court held on motion to dismiss that either the statute was intended to justify condemnation proceedings, or that it did not so intend, that in any case condemnation proceedings could not be maintained, because if that were the intent the statute was unconstitutional and if it were not the intent the proceedings were unauthorized.

In re Montgomery, 48 Federal, pp. 901, 902.

This case was affirmed by the Circuit Court of Appeals. *In re Manderson*, 51 Federal, pp. 501, 503, 504.

See also: *Albert Hanson Lumber Company* v. *United States*, 43, Supreme Court Reporter, pp. 442, 444.

4.

The next question is whether reports of the House and Senate Committees, as well as explanatory statements of the committee member in charge of the bills made in the course of passage of the above mentioned Acts, are admissible to show the legislative intent. (Rec. pp. 66, 76, 124).

That this question must be answered in the affirmative is settled by repeated decisions of this court.

Church of the Holy Trinity v. *United States*, 143 U. S. 457, 36 L. Ed. 226.

Binns v. *United States*, 194 U. S. 486, 48 L. Ed. 487.

United States v. *Forty Barrels*, 241 U. S. 265, 60 L. Ed. 995.

United States v. *St. Paul M. & M. R. Co.*, 247 U. S. 310, 62 L. Ed. 1130.

Duplex Printing Press Co. v. *Derring*, 254 U. S. 443, 65 L. Ed. 349.

The above cases well illustrate the wide latitude sanctioned by this court in the admission of evidence which this court has allowed, showing the legislative history of an act of Congress, when the proper construction of such act was before the courts.

In the case of *United States* v. *St. Paul M. & M. R. Company, supra,* this court had under construction the Act of March 2, 1896, relative to extension of time within which suit might be brought to vacate and annul land patents. In one portion of the Act reference was made to "patents heretofore erroneously issued" and to "patents hereafter issued." The court, however, in construing the Act considered its legislative history and especially the remarks of Mr. Lacey, Chairman of the Committee and in charge of the bill while it was under consideration in the House, and in its decision practically eliminated the words "patents hereafter issued," as being opposed to the plain purpose of Congress in enacting the measure.

In the case of *Duplex Printing Press Co.* v. *Deering, supra,* the question before the court was whether the so-called secondary boycott was legalized by the provisions of the Clayton Act of October 15, 1914. And in order to arrive at its conclusion the court considered the report of the Senate and House Committee as well as the remarks made by the committee member in charge of the bill in course of passage. When the above question was under consideration by the House, Mr. Webb of the House Committee who had the bill in charge stated emphatically and unequivocally that it was not the intention of the Committee to legalize the secondary boycott. His remarks are quoted in a note to the opinion of the court. Mr. Justice Pitney who delivered the opinion of the court stated in part:

> "This was the final word of the House Committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it

is not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported."

The words last quoted are peculiarly applicable to the facts of the case at bar. No one can read the reports of the House or Senate committees, or the remarks of the members of such committees in charge of the bill during the course of its passage in the House and Senate without reaching the conclusion that the sole purpose of the Act (H. R. 7158), was to permit the United States to carry out obligations incurred prior to the passage of the Act of July 11, 1919, and that in each case the United States was definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the Department. (Rec. pp. 117 to 131 inclusive). And it is a fair conclusion that the bill would never have passed either the House or Senate but for the assurances given by the Chairmen of the said committees as to its object, as hereinbefore indicated.

It is perfectly apparent from committee reports and the statements of members in charge of the Act of March 8, 1922, that such an act was never intended to create an exception to the general rule as announced in the Act of July 11, 1919, but only covered specific cases where the United States was legally or morally bound. The entire congressional discussion incident to the passage of the bill clearly shows this. And at the risk of repetition, counsel for plaintiff in error desires again to refer to same. It will be recalled that Mr. McKenzie of the House Committee, and Senator Wadsworth of the Senate Committee, had used identical language in making their reports and stated definitely and positively that:

"In each case it is apparent the United States is definitely obligated under the terms of a written contract or an award made by a duly authorized agent of the Department." (Rec. p. 68).

Mr. McKenzie further made the statement in the House:

"The only purpose of this bill is to authorize the appropriation of a sufficient amount of money to cover the balance due on these various projects and to enable the citizens of our own country to get what rightly and justly belongs to them." (Rec. p. 124).

again:

"But the citizens whose lands have been taken are entitled to compensation, and this bill is for that purpose, and the use we can make of that property, if we can get it, will have to be hereafter determined." (Rec. p. 125).

Mr. Greene of Vermont:

"The present policy of this Government is not involved here. We are here trying to pay people a contractual obligation which was made in war time, which is now pending on an old policy that is a legacy from the last administration." (Rec. p. 127).

"These are real estate contracts which were in process of completion when the House suddenly cut off the payment of any money, it made no difference whether the contract was good, bad or indifferent." (Rec. p. 127).

Mr. Sanders of Indiana:

> "The Government of the United States, under the authority of an act passed by this Congress, has entered into solemn contractual obligations with citizens of the United States for their private property, for use of war purposes." (Rec. p. 127).
>
> "* * * Whenever a solemn contract fixes the amount, you need no litigation, and all you need is an appropriation by the Congress."

Senator Nelson was insistent in making the record perfectly clear on the point under discussion, as will appear from the following colloquy between him and Senator Wadsworth, in charge of the bill:

> "Mr. Nelson: Are there any of them as to which no agreements have been made and no condemnation proceedings had?
>
> Mr. Wadsworth: Yes, there is one, and I was going to ask that that be stricken from the bill.
>
> Mr. Nelson: Which one is that?
>
> Mr. Wadsworth: It is the one relating to the quartermaster's warehouse at Baltimore, Md., that provision which authorizes the Secretary to sell to the Canton Co. of Baltimore, for $300,000 the improvements erected upon the site. I am going to ask that that be stricken from the bill. The Secretary informs me that he is now in negotiation with the owners of the land to get them to purchase the Government buildings, and he will be in position to get a better deal than that provided for by the House provision, and he wants that stricken from the bill. The Military Committee authorized me to offer that amendment."
>
> (Congressional Rec., December 22, 1921, pp. 769, 770.) (Rec. p. 129).

5.

The next question is whether the lands sought to be condemned in this case are taken by the United States for the public use, or simply for the public benefit, to protect the Government's interests in certain expenditures made, or improvements placed on said lands, and whether "public use" and "public benefit" are synonymous terms.

The Circuit Court of Appeals held that even though the condemnation was for the sole purpose of salvage of public treasure, this would nevertheless constitute the taking for the public use and be within the spirit of the constitutional provision. In other words the court held that "public use" and "public benefit" were synonymous terms. (Rec. p. 103).

The District Court did not base its decision on this ground.

"Public use" and "Public benefit" are not synonymous terms. "Public use" means a use by the public, and not mere incidental or indirect public benefit. "Public use" implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies, and due protection of the rights of private property will preclude the Government from taking it from the hands of the owners and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the land may be devoted.

Lewis on Eminent Domain, Sec. 165;
Richmond v. *Carneal*, 129 Va., p. 368;

Salibury Land & Improvement Co. v. *Massachusetts* (Mass.), 46 L. R. A. (N. S.), p. 1196 and note;

Madisonville Traction Co. v. *Saint Bernard Mining Co.*, 196 United States, p. 239, 49 Law Ed., p. 462;

In Re: Opinion of Justices, 204 Mass., p. 607, 27 L. R. A. (N. S.), p. 483 and note.

In *Bloodgood* v. *Mohawk*, 18 Wend. (N. Y.), p. 9, 31 Am. Dec., p. 313, it is said:

> "When we depart from the natural import of the term "public use" and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term, 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us."

The rule is thus stated by Judge Cooley:

> "The public use implies a possession, occupation, and enjoyment of the land by the public or public agencies, and it is not enough that the public would receive incidental benefits, such as usually spring

from the improvement of lands or the establishment of prosperous private enterprises." Cooley, Const. Lim. 7th ed. 766.

In Lewis on Eminent Domain, 2d ed., 165, it is stated:

"The use of a thing is strictly and properly the employment or application of the thing in some manner. The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

"If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use, and the act of appropriation is void. This interpretation will cover every case of appropriation that has been deemed lawful by any court, except a few in relation to mills, mines, and drainage. If exceptional circumstances

> require exceptional legislation in those respects in any state, it is very easy to provide for it specially in the Constitution, as has been done in several states."

The Circuit Court of Appeals in its opinion stated that its conclusion was in accrod with the principle applied in *Strickland* v. *Highland Boy Gold Mining Company*, 200 U. S. 527; *Hairston* v. *Danville & Western Railway Company*, 208 U. S. 598; and *Brown* v. *United States*, 1923-1924, p. 104, 68 L. Ed. ———.

It is respectfully submitted that the cases cited do not justify such conclusion.

The case of *Strickland* v. *Highland Boy Gold Mining Company, supra,* follows the decision in *Clarke* v. *Nash*, 198 U. S. 361, 49 L. Ed. 1085. These cases uphold the constitutionality of the Utah statute which provides that "the right of eminent domain may be exercised in behalf of the following public uses * * * (6) roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ore or the work of mines." The Supreme Court of Utah has upheld that statute as constitutional. This court held that under the peculiar circumstances of the case the said statute did not violate the Fourteenth Amendment of the United States Constitution, but Mr. Justice Peckham was careful to say in the case of *Clark* v. *Nash*:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the

taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law."

It will be noted that in these cases the court emphasized the fact that the decision of the State court upheld the constitutionality of the statute; accordingly had these cases gone up from Virginia, there can be little doubt that the decision would have been favorable to the land owner, especially in view of the fact that the Supreme Court of Appeals of that state has adopted the construction of the words "public use" herein contended for in a well considered opinion.

City of Richmond v. *Carneal*, 129 Va. 388.

In the case of *Brown* v. *United States, supra,* it was held that the power of eminent domain might be exercised by the United States to secure land for a town site to which buildings on the tract taken might be removed. The ruling was based on the fact that the acquisition of the town site was absolutely essential to the construction of the reservoir on the land condemned. The court held that the transaction was not properly described as the condemnation of the land of one private owner to sell to another, but likened the case to one where a railway company was authorized to condemn lands and needed adjacent lands for the purpose of dumping the earth excavated from tunnels and cuts. Mr. Chief Justice Taft stated that the conclusion of the court was not in conflict with that class of cases with which the justices of the supreme judicial court of Massachusetts dealt in Opinion of Justices, 204 Mass. 607, 27 L. R. A. (N. S.) 483. It was there proposed that the City of Boston in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of the same, after the improvement was made. The Chief Justice said:

> "The distinction between that case and this is, that here we find that the removal of the town is a necessary step in the public improvement itself, and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation."

In the case of *Hairston* v. *Danville and W. R. Company, supra,* the court held that condemnation of land by a railroad company for a spur track in order to obtain more and

better terminal facilities to meet the demands of the business was none the less public because the motive which dictated the location over the particular land was to reach a private industry. The authorities are practically agreed on that point and the facts of the case would seem to require no comment.

The contention of the plaintiff in error in this case is that the United States in this condemnation proceeding is endeavoring to save money for the Government by an outside land speculation, and that the incidental saving in money to the United States arising from this condemnation proceeding does not constitute such public use as is contemplated by the constitutional provision.

But it is said that the use of the words "for the quartermaster warehouses at Newport News" in the Act is an expressed declaration that the property is to be taken for the plainly public use of quartermaster warehouses.

It is true that the Act of March 8, 1922, uses the language quoted, but it is the contention of the plaintiff in error that such language is merely descriptive of the property as it existed at the time of the passage of the Act.

The Act must be read in connection with the facts that existed at the time the law was enacted. Long before the enactment of the Act of March 8, 1922, these properties were known as "Quartermaster Warehouses." In the specific recommendation of the Secretary of War long before the Act was passed it is estimated that $223,670 is necessary to acquire the Quartermaster Warehouses at Newport News, Va. (Rec. p. 72).

The Secretary's letter to the Attorney General authorizing these proceedings speaks of the "Quartermaster's Warehouses" as structures which had long been in exis-

tence (pp. 7-8, Record), which structures he had previously stated to the Military Committees were no longer necessary for the public use (p. 63, Record).

This recommendation, showing that the purpose of the act was to acquire the site for the quartermaster warehouses then in existence, was transmitted to Congress by the Chairman of the Committee of Military Affairs of the House and of the Senate. The language used in the Act is and was intended to be descriptive of the property sought to be acquired and is not in any sense to be taken as a statement of the use for which the property is acquired.

The site the several bills sought to acquire was a site which had been used for a military purpose which was a public use while the military need therefor existed. There is nothing in either act to show that the future use of the property would be for quartermaster warehouses. The preamble of the Act of March 8, 1922, shows that the purpose of the Act is not to subserve any military purpose, but that it was only to carry out obligations which the Government had incurred and the reports of the chairman of Military Committees to the Senate and House show that as the sole purpose of the Act.

It is true that the caption of the section of the Act of July, 1922, making appropriations for the purchase of the warehouse lands is "Sites for military purposes," but this Act neither authorizes, nor attempts to authorize anything more than is authorized in the Act of March 8, 1922. It is simply to appropriate for the purchases provided for in that Act and does not in any manner extend the purview of the former Act. It is merely a conventional designation, just as in the same Act under the general head of "Naval Establishment" we find "Scrapping of Naval Vessels" when the actual provisions thereunder have nothing to do with the scrapping of naval vessels, but merely provide for the care and preservation of ships whose construction

has been suspended pending the taking effect of the Disarmament Treaty, a future event, the occurrence of which was at that time by no means certain.

That the meaning of the Act of July, 1922, is as here contended for is clear from the terms of the Act:

> "Sites for military purposes: For completion of acquisition of real estate as authorized by an Act approved March 8, 1922, entitled an 'Act to amend the Army Appropriation Act approved July 11, 1919, so as to release appropriations for the completion of the acquisition of real estate in certain cases and making additional appropriations therefor,' as follows:"

Following the language above quoted is an enumeration of various properties in which list is found the words "Quartermaster Warehouses, Newport News, Virginia, $223,670."

The caption, "Sites for Military Purposes," adds nothing to the Act of March 8, 1922, and for the purposes of this case should be read to have only the sense that the words "Quartermaster warehouses" had in the Act of March 8, 1922.

The fact that the words "for the Quartermaster warehouses, etc." were merely used to identify this particular property, and not to indicate the future use to which said property was to be devoted is abundantly supported by the record.

The District Court certified as a fact that prior to the passage of the Act of March 8, 1922, and as an inducement thereto, and prior to the institution of these proceedings, accredited officers of the War Department, acting

for and on authority of the War Department and the Secretary of War, had stated to the Special Sub-Committee of the Committee on Military Affairs to whom H. R. 7158 had been referred by Congress for consideration and report, which bill was subsequently enacted into the law of March 8, 1922, entitled "An Act to Amend the Army Appropriation Act," etc., that the property sought to be taken in these proceedings was no longer needed for the public use, but solely to protect the United States Government's investment in the buildings on said property. (Rec. pp. 62-63).

It was further certified that prior to the institution of these proceedings, the War Department had been engaged in negotiations for the sale of the warehouses on said land to various parties; that in December, 1921, or January, 1922, the City of Newport News was engaged in negotiations for the purchase of said warehouses, in the course of which the Secretary of War informed Mr. P. W. Hiden, mayor of said city, that these warehouses were surplus property and not needed by the Government and that on the 18th day of July, 1922, a lease to these warehouses was executed by the Assistant Secretary of War to Edward W. Wolcott, a citizen of Norfolk, Virginia, in nowise connected with the United States Government. (Rec. p. 63).

And it further appears that while the bill was in course of passage in the Senate, the bill being in charge of Senator Wadsworth, Chairman of the Senate Committee on Military Affairs, the following discussion was had: (Rec. pp. 129, 130).

> "Mr. Jones, of Washington: Does the Senator really think we would make money by investing more money, in order to get title to the land which has the

buildings on it if the buildings are not suitable for use by the private parties?

Mr. Wadsworth: Oh, decidedly; yes.

Mr. Jones, of Washington: That has been very carefully looked into by the committee?

Mr. Wadsworth: Yes; it has been very carefully looked into by the committee."

(Congressional Rec., December 22, 1921, p. 771).

"The bill is designed to enable the War Department to clean up the title to various pieces of real estate upon which the Government now owns very valuable buildings. The projects are listed in the bill, and the amount of money necessary to acquire title to the remaining small parcels or tracts of real estate is set forth in connection with each project. As a matter of fact, while the bill proposed to appropriate $4,000,000, it will put the Government in a position, where it can save large amounts of money in the future, either by selling these properties, in which the Government has invested such immense sums, or, in some instances, by leasing them to industrial concerns."

"Mr. King: Is it the intention of the Government to keep all the buildings that have been erected upon the tracts referred to in the bill?

Mr. Wadsworth: I should hope that it was the intention of the Government to sell most of these places, but they can not do so until they own finally the parcels of land underneath the buildings.

Mr. King: Does the testimony indicate that the Government will recoup much more than this bill carries?

Mr. Wadsworth: Yes, it indicates that it will recoup much more.

Mr. King: The committee are unanimous in the

view that the $4,000,000 proposed to be appropriated should be expended?

Mr. Wadsworth: Yes; in order to save a much larger sum, in the discretion of Congress, later on."

(Congressional Rec., February 17, 1922, p. 3007).

"Mr. Wadsworth: It frees the hands of the Government. There is over $130,000,000 invested by the Government in permanent construction in these projects. If we will spend $4,000,000 now, we will get title to the last parcel that underlies those buildings. Then we can do what we please with them. Until we get title, our hands are tied."

(Congressional Rec., February 17, 1922, p. 3008).

It is therefore submitted that the history of the passage of this bill clearly shows that this condemnation proceeding was instituted solely to protect the Government's investment, and that said property was not needed for public use.

EXISTING PUBLIC NEED THE CRITERION.

It seems to be well settled that the power to condemn for public use can only be used to supply some *existing* public need.

Cooley's Const. Lim., p. 764.
20 C. J. 547, note (a).

The second paragraph of the petition of the Government states that the land is needed by the petitioner for a

cite for quartermaster warehouses for the use of military forces, and/*or inland or port storage and shipping facilities.*

From this allegation it appears that the character of the use was uncertain. Whether the use was to be public or private was not even known to the pleader.

In the congressional discussion Mr. McKenzie, in charge of the bill in the House, frankly said:

> "The use we can make of that property, if we can get it, will have to be hereafter determined." (Rec. p. 125).

All that this Court can say after reading the statutes relied on by the Government and reading the petition of the Government is that the property may have been intended for a public use or may not have been. If it gives any effect at all to the reports of the two chairmen of the Committees (Rec. pp. 63-76) it will be compelled to hold that the property was not required for a public use. If the Court gives any effect to the granting of the lease by the Secretary of War to Edward Wolcott (Rec. p. 63), it becomes entirely clear that no then present public use existed for the taking of the land, since that lease could not be given except under the provisions of the Act of July 28, 1892, which authorized such leases only during the period when there was no public use. That lease by its terms begins on the first day of August, 1922, one day after the institution of these proceedings.

GOVERNMENT AUTHORIZED TO SELL OR LEASE THIS PROPERTY.

It will be noted that the District Court, in reaching its conclusion, was influenced by the assumption that there

was then no Act of Congress which would authorize the sale or lease of this property. (Rec. p. 43).

The Circuit Court of Appeals expressed some doubt whether the Appropriation Act of 1919 gave such authority to the Secretary of War. (Rec. p. 103).

It is respectfully insisted that the second chapter of the Army Appropriation Bill, First Session of the 66th Congress, United States Statutes at Large, pages 129-130, expressly authorized sale or lease of this property in the following provision:

> "Disposal of real property by sale or lease: That the President is hereby authorized, through the head of any executive department, upon terms and conditions considered advisable by him or such head of department, to sell or lease real property or any interest therein or appurtenant thereto acquired by the United States of America since April 6, 1917, for storage purposes for the use of the Army, which in the judgment of the President or the head of such department is no longer needed for use by the United States of America, and to execute and deliver in the name of the United States and in its behalf any and all contracts, conveyances, or other instruments necessary to effectuate any such sale or lease."

The last quoted Act was, of course, in existence at the time that the Statutes of March 8, 1922, and July 1, 1922, were enacted. The character of the property which is sought to be acquired was for storage purposes as particularly indicated in the last quoted Act. The Secretary of War had indicated to Congress, through its appropriate committee, prior to the passage of the Act of March 8, 1922, that

there was no longer any military use of the Army for the warehouse property now sought to be condemned and that same was no longer needed for use by the United States.

The Act last above quoted should be read in connection with these highly significant recommendations. When so read the construction of the Statutes of March 8 and July 1, 1922, is quite different from that which the Court deduced.

When so read the Acts of March 8 and July 1, 1922, clearly disclose that the Congressional purpose in acquiring this property was to subserve the financial or speculative need of the Government rather than to devote the property to further military use.

On this point the District Court did not refer to the Appropriation Act of 1919. The Circuit Court of Appeals gave no reason for its conclusion. Doubtless it was influenced by the argument of counsel for the Government that this Act was passed three years before the Act of March 8, 1922, and that the property which was authorized to be sold was only the property which had then been acquired. This argument overlooks the fact that the Act which authorized the President through the head of any executive department, to sell or lease property acquired for storage purposes, was the very Act of July 11, 1919, which the Act of March 8, 1922, amended. The authorization to sell was directly applicable to lands sought to be acquired in these proceedings. It was the specific purpose of the Act of March, 1922, to raise the bar imposed by the Act of July 11, 1919, so as to allow the acquirement of property which the Government had obligated itself to take and, presumably of necessity, which the owner had obligated itself to sell to the Government prior to July 11, 1919, and it is the theory of the Act of March, 1922, that the property had been acquired *but not paid for by the Government* prior to the Act of July 11, 1919.

If there could be any clearer power given to the President or Secretary of War to sell the property sought to be acquired in these proceedings, it is difficult to imagine it. Counsel for the Plaintiff in Error renew their insistence that this authority of the President, *or the head of any executive department* to sell should be read in connection with the Act of March, 1922, authorizing the purchase and, with reference to the declaration of the Secretary of War that the lands were not required for any public use but merely to sell again and thus to subserve a speculative purpose, wherefrom financial advantage was hoped.

6.

The next question is whether the facts proved by the plaintiff as set out in Bill of Exceptions No. 3 showed that said lands were not sought or taken for the public use should have been considered by the District Court and Circuit Court of Appeals. (Rec. p. 65).

The ground on which the District Court declined to consider these facts was that the Act itself contained a solemn statement that the appropriation was made "for the Quartermaster Warehouses" and that it would be unseemly and destructive of the independence of the different branches of the Government" for the Court to hold otherwise. (Rec. p. 44.) And the Circuit Court of Appeals substantially took the same view. (Rec. p. 102).

This question is covered by the fifth and twelfth assignments of error.

If the plaintiff in error is correct in its conclusion that the use of the words "for the Quartermaster Warehouses" contained in the Acts of Congress under discussion were merely descriptive of the property to be taken, and not indicative of the use for which said property was sought to be

acquired, then it is clear that the facts proven upon trial of the case should have been considered by the court in determining whether the property of the plaintiff in error was taken for a public use.

It is the sole province of the courts to determine whether a use is a public use.

> *United States* v. *New River Collieries Company*, 262 U. S. 341, 67 L. Ed. 1014;
> *Monongahela* v. *United States*, 148 U. S. 312;
> *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 52 L. Ed. 637;
> *Sears* v. *Akron*, 246 U. S. 242; 62 L. Ed. 688;
> *Rindge* v. *Los Angeles*, 262 U. S. 700, 67 L. Ed. 1186.

In this view of the case, it is not a question whether the court can deny the truth or good faith of the expressed declaration in the statute, as suggested in the opinion of the Circuit Court of Appeals. (Rec. p. 102). When the language of the statute is considered in the light of the facts proved in the case, (Rec. pp. 63 to 65, incl.), and the congressional history of the Act is likewise taken into consideration, (Rec. pp. 118 to 131, incl.), it is clear that the words "for the Quartermaster warehouses," which otherwise might have been construed to designate the use to which this property was to be put by the Government, are simply used to point out the particular property to be taken. The statute would then be silent on the question of future use, and under all of the authorities evidence would be admissible to show that the purpose of the Government was to sell or lease the improvements it had placed upon the land.

7.

The next question is whether any provision in the Acts of Congress of March 8, 1922, *or July* 1, 1922, *precluded the plaintiff in error from showing that the purpose of Congress was not to take the property of the plaintiff in error for a public use but for a private use or purpose, namely, to enable the United States of America to sell or lease said land to private interests.* (Rec. p. 65).

This question is covered by the fifth and seventeenth assignments of error. (Rec. pp. 112, 131).

If the court should not adopt the view urged under section 6 of this brief, it is nevertheless insisted that the mere legislative declaration that a use is public is not binding on the courts, and that evidence should be received by the court to show that the purpose of the taking of defendant's property was not a public purpose but a private purpose, namely to save the Government's investment.

The constitution of the United States provides that private property shall not be taken for public use without just compensation, and by necessary implication that private property shall not be taken for private use at all. Accordingly, the right to take private property depends on two things, namely, that it must be for a public use, and that compensation must be made for the same. If Congress, by a mere *ipse dixit* can determine this question, and take away from the courts the power to pass on the same, what protection is the constitutional provision to the citizen?

20 C. J., 549;

Block v. *Hirsh*, U. S. Supreme Court, 256, U. S., 135; 65 L. Ed. 865; 15 A. L. R. 170;

Alfred Phosphate Co. v. *Duck River Phosphate Co.*, (Tenn.), 22 L. R. R. (N. S.) 701;

Varner v. *Martin*, 21 W. Va. 534, 550.

We believe the best statement of the law is found in *Varner* v. *Martin, supra,* where Judge Green, who delivered the opinion of the Court, says:

> "The Legislature by its general act declares in the first place what is a 'public use' for which private property may be condemned; but in the very nature of the case this determination of the Legislature in the first instance cannot be conclusive on the courts. If it were, the provision of our bill of rights, that private property shall not be taken for public uses, except on the payment of just compensation, implying as it does, that private property shall not be taken except for public use, would be of little practical value. It was intended as a protection to the citizen against the abuse of power by the different departments of the government. The constitutional provision was more expressly intended to control the legislative department of the government. How can this control be exerted or made available if the legislature is the sole judge of the extent of its power in authorizing this exercise of the right of eminent domain? Would not the so holding render the legislature omnipotent in this respect, when the Constitution shows that it was deemed a dangerous power, which needed to be restrained to prevent injustice to the individual citizen? Both reason and authority lead us to the conclusion, that the existence or nonexistence of a public use, in any given class of cases, in which the legislature has authorized private property to be condemned, must be determined by the courts."

8.

The last question is whether the plaintiff in error is entitled to compensation for the value of the buildings erected on the leased premises and not removed within the time provided in the lease. (Rec. p. 87).

This question is covered by the sixth and fourteenth assignments of error. (Rec. pp. 112, 122).

The warehouses in controversy were built on the property leased from the Old Dominion Land Company by the United States Government, which lease contained a provision giving the Government the right to remove improvements placed thereon within thirty days after the expiration of the lease, and these improvements had not been removed within the prescribed period. (Rec. p. 62).

Though there are some decisions to the contrary, the weight of authority seems to be, that where the party seeking to condemn has entered upon the property and erected improvements thereon with the consent of the owner, and with a view to instituting condemnation proceedings, or where such entry has been made and improvements erected pending condemnation proceedings, which are subsequently abandoned, or where in ignorance of the ownership of the land entry is made with intention for subsequently instituting condemnation proceedings, or where condemnation proceedings have been instituted under a statute afterwards declared unconstitutional, or for any reason the proceedings are defective—the value of improvements erected by the petitioners in condemnation proceedings will not be considered in estimating damages. It is submitted that this is as far as courts in Virginia and the United States courts have gone.

Nor. & O. V. Ry. Co. v. *Turnpike Co.*, 111 Va. 131;
New River Etc., Co. v. *Honaker*, 119 Va. 641;
Bear Gulch Placer Min. Co. v. *Walsh*, 198 Federal 351;
Gearl v. *Lake Company*, 133 U. S. 553; 33 L. Ed. 740;
Consol. Turnpike Co. v. *Norfolk, etc. Ry. Co.*, 228 U. S. 596; 57 L. Ed. 982.

But the facts of this case do not bring it within any of the illustrations above given. On the contrary, when the leases in controversy were made, the United States had no idea of taking the same in condemnation proceedings, but on the contrary, took the precaution to execute a written contract with the owner, whereby the right of removal was given it within a certain limited time. Under these circumstances it is earnestly submitted, there being no intention to take this property by purchase or condemnation when the improvements were erected, and the facts simply showing a case of neglect to remove the improvements within the time limited in the contract of lease, said improvements now belong to the owner.

Buildings not removed during the term, or time limited by lease, become the absolute property of the lessor.

2 Minor's Inst., 613;
25 C. J., p. 706;
11 R. C. L., p. 1072;
Freeman v. *Dawson*, 110 U. S. 264, 28 L. Ed. 141;
Kinkead v. *United States*, 150 U. S. 483;
United States v. *Bostwick*, 94 U. S. 65, 69;
Clifford v. *United States*, 34 Court of Claims, p. 232.

And this was the opinion of the Attorney-General in a similar case.

32 Op. Attorney-General, pp. 114, 124, 126.

The tenant's right of removal continues during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant or during his rightful continuance in possession.

26 C. J., 705;
Wood on Landlord and Tenant, p. 529;
Morey v. *Hoyt*, (Conn.), 19 L. R. A., 611;
Ray v. *Young*, (Iowa), 46 L. R. A. (N. S.), 947, 951, 952.

See also *Tunis Lumber Co.* v. *Dennis Lumber Company*, 97 Va. 682, 684, wherein the court approved an instruction to the effect that a tenant erecting buildings on leased premises for his own benefit, could only remove the same during a continuance of the term.

Express provision as to the period after the expiration of the lease within which the removal may be made, precludes a removal thereafter.

26 C. J., 713;
Highes v. *Kershaw*, (Colo.), 51 L. R. A. (N. S.), 723.

The words "thirty days after vacation under this lease" contemplates that the lessee will surrender possession of the premises at the time stated in a lease. A lessee cannot, by wrongfully withholding possession of the premises,

extend his right to remove the buildings, thus profiting by his own wrong.

26 C. J., 707.

For these reasons it is submitted that the trial court erred in refusing to charge the jury as requested by the defendant, and in charging the jury that the defendant was not entitled to have the value of such improvements considered by the jury. (Rec. pp. 87, 88).

The opinions of the District Court and the Circuit Court of Appeals both contain the statement that the condemnation proceedings were commenced one day before the expiration of said period of thirty days. (Rec. pp. 41, 102). The record shows that the only possession which the Government had at the time of the institution of these proceedings was a possession not for any general purpose, but the specific purpose of removing these buildings. The right of possession of the plaintiff in error was complete except as to such possession of the United States as was necessary to enable it to remove the buildings. Plaintiff in error does not understand, nor has it ever been informed of the rule of law relied on by the United States whereby the institution of these proceedings in any wise expands the right of possession, or the right to remove the warehouses. The time which elapsed after the institution of these proceedings might have been used by the United States for the purpose of removal or destruction of the warehouses, but it is not perceived that any other right would follow thereon.

The filing of the condemnation proceedings could not extend the time of the United States for the removal of the buildings. The measure of its right in that respect was settled by the contract. The fact that the condemnation proceedings were *begun* during the period in which the

United States was in rightful possession of the property cannot serve to extend their right of possession, or the term of removal, and the consequences of non-removal were impliedly fixed by the lease and actually fixed by law.

On the day when the petition in this cause was filed the date of the removal of the buildings expired and thereupon they became the property of the owner of the land as provided in the lease as well as the general rule of law. The fact that the buildings belonged to the Government does not change the general rule of law, which obtains throughout the United States.

For these and other reasons to be assigned at bar, counsel for Plaintiff in Error respectfully pray that the judgments of the District Court and the Circuit Court of Appeals be reversed.

Respectfully submitted,

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